SUPREME COURT, U. S.
MAY 29 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. ~~1496~~ 207

OWEN E. JACKSON, GEORGE DITSON JONES, GEORGE H. HOWELL, JR., WINONA L. JACKSON and TRANSCONTINENTAL OIL CO., INC. of NEVADA, now known as TRANSCONTINENTAL POWER COMPANY, a corporation,

Petitioners and Defendants,

vs.

WESTERN GEOTHERMAL, INC., a corporation,

Respondent and Intervenor,

WILLIAM FREE,

Respondent and Plaintiff,

and

HARRY C. LEVY, as Receiver of Transcontinental Power Company, SALTON SEA POWER COMPANY, and HARRY LEVY, as Receiver of Salton Sea Power Company,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Nevada.

ROY B. WOOLSEY and
GILBERT W. BOYNE,
1617 Westcliff Drive,
Newport Beach, California,
Attorneys for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

	Page
Petition for Writ of Certiorari to the Supreme Court of the State of Nevada	1
Opinions Below	2
Jurisdiction	2
Questions Presented	2
The Constitutional Provisions Involved	3
Statement of the Case	4
A. Orders of the Trial Court	4
B. The Facts	4
C. Petitioners Are Proper Parties on Certiorari	9
D. The Federal Questions Sought to Be Reviewed Were Raised Timely and Properly	10
Argument Amplifying the Reasons Relied on for the Allowance of the Writ	12
Opinions and Judgments Appended	20
Conclusion	20

INDEX TO APPENDICES

Page

Appendix A. Order Approving Settlement Agreement and Assignment of Lease Made on February 26, 1965, in the District Court 1

Appendix B. Order of the District Court Dated May 4, 1965, Dismissing Counterclaims 3

Appendix C. Decision of the District Court Dated February 23, 1966, on Motion to Set Aside Orders 4

Appendix D. Order of the District Court Dated February 23, 1966, Denying the Motion to Set Aside Orders 7

Appendix E. Opinion of the Supreme Court of the State of Nevada Dated January 9, 1967, Affirming Trial Court Orders 8

Appendix F. Judgment of the Supreme Court of the State of Nevada Dated January 9, 1967, Affirming the Trial Court 19

Appendix G. Order (Constituting an Opinion) of the Supreme Court of Nevada Dated February 13, 1967, Denying Petition for Rehearing 20

Appendix H. Judgment by the Supreme Court of the State of Nevada Dated February 13, 1967, Denying Petition for Rehearing 23

TABLE OF AUTHORITIES CITED

Cases	Page
Clay v. Sun Ins., 363 U.S. 207, 480 S. Ct. 1222, 4 L. Ed. 2d 1170	16
Douglass v. Douglass, 21 Wall. 98, 88 U.S. 98, 22 L. Ed. 479	15
Durfee v. Duke, 308 F. 2d 209	18
Durfee v. Duke, 375 U.S. 106, 84 S. Ct. 242, 11 L. Ed. 2d 186	18
Florida Canada Corporation v. Union Carbide Corporation, 280 F. 2d 193, cert. den. 81 S. Ct. 234, 364 U.S. 902, 5 L. Ed. 2d 194	15
Frankfort Oil Company v. Snokard, 279 F. 2d 436, cert. den. 81 S. Ct. 283, 364 U.S. 920, 5 L. Ed. 2d 259	15, 16
Hartford A & J Co. v. Delta Pine Land Co., 292 U.S. 143, 54 S. Ct. 634, 78 L. Ed. 1178	16
Holderness v. Hamilton Fire Insurance Co. of New York, 54 F. Supp. 145	17
Home Ins. Co. v. Dick, 281 U.S. 397, 50 S. Ct. 338, 74 L. Ed. 926, 74 A.L.R. 701	16, 17
Hosford v. Henry, 107 Cal. App. 2d 765, 238 P. 2d 91	11, 17, 18
Huntington v. Attrill, 146 U.S. 657, 13 S. Ct. 224, 36 L. Ed. 1123	19
Lamb v. Powder River Live Stock Co., 132 Fed. 434	17
Lynch v. U. S., 292 U.S. 571, 54 S. Ct. 840, 78 L. Ed. 1434	17
Martinez v. Fox Valley Bus Lines, 17 F. Supp. 576	17

Page

Melvin v. Carl, 118 Cal. App. 249, 4 P. 2d 954 ..... 12, 18

National Tea Co. v. Weiss, 341 F. 2d 331 16

Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed. 565 19

Scott v. McNeal, 154 U.S. 34, 14 S. Ct. 1108, 38 L. Ed. 896 19

Siemon v. Russell, 194 Cal. App. 2d 592, 15 Cal. Rptr. 218 ..... 11, 16

Terraccoiona v. Magee, 148 A. 2d 68, 53 N.J. Super. 557 17

Universal Oil Land Co. v. Gates, 117 Cal. App. 363, 2 P. 2d 1034 ..... 11, 12, 18

Statutes

United States Code, Title 28, Sec. 1257(3) 2

United States Code, Title 28, Sec. 2101(c) 2

United States Code, Title 28, Sec. 2106 2

United States Constitution, Art. IV, Sec. 1 3

United States Constitution, Fourteenth Amendment 11, 16, 17

United States Constitution, Fourteenth Amendment, Sec. 1 3

IN THE

Supreme Court of the United States

October Term, 1966
No. .....

OWEN E. JACKSON, GEORGE DITSON JONES, GEORGE H. HOWELL, JR., WINONA L. JACKSON and TRANSCONTINENTAL OIL CO., INC. of NEVADA, now known as TRANSCONTINENTAL POWER COMPANY, a corporation,

Petitioners and Defendants,

vs.

WESTERN GEOTHERMAL, INC., a corporation,

Respondent and Intervenor,

WILLIAM FREE,

Respondent and Plaintiff,

and

HARRY C. LEVY, as Receiver of Transcontinental Power Company, SALTON SEA POWER COMPANY, and HARRY LEVY, as Receiver of Salton Sea Power Company,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Nevada.

Petitioners Owen E. Jackson, George Ditson Jones, George H. Howell, Jr., Winona L. Jackson and Transcontinental Oil Co., Inc. of Nevada, now named Transcontinental Power Company, a corporation, often referred to as Transcon, pray that a Writ of Certiorari issue to review judgments of the Supreme Court of Nevada in the matter before it entitled Jones vs. Free, its No. 5107 and the district court orders affirmed thereby.

Opinions Below.

The opinion of the Supreme Court of Nevada is reported at 422 P. 2d 551. That opinion will be, and the opinion denying rehearing may be, reported in 83 Nev. They are respectively Appendices E and G hereto. The District Court opinion (Appendix C) will not be reported.

Jurisdiction.

On January 9, 1967 the Supreme Court of Nevada rendered its decision, filed its opinion and entered judgment in subject matter. On January 24, 1967 petitioners filed timely a Petition for Rehearing. On February 13, 1967 said court filed its order denying said petition and entered judgment accordingly. On May 4, 1967 the Honorable William O. Douglas, Justice, ordered that the time for filing a Petition for Writ of Certiorari be extended to and including June 1, 1967.

The statutory provisions believed to confer jurisdiction on the Supreme Court to review on Certiorari are: 28 U.S.C. §1257 (3) and §2106. The application is timely: 28 U.S.C. §2101 (c).

Questions Presented.

A negative answer to any of the following jurisdictional questions should result in certiorari and reversal:

1. Can a state court constitutionally remake the contract between the parties?

2. Can a temporary receiver of one party appointed on the application of another party to a lawsuit constitutionally remake the contract between the parties to such suit?

3. Prior to a judgment on the merits, can a court constitutionally delegate to a receiver the

authority to settle the very litigation in which he was appointed and deny to a litigant a trial on the merits?

4. Can a receiver appointed in an action in one state convey or alter title to land in another state without an appointment or court order in the state where the land is situated?

Other questions are:

5. Have petitioners been deprived of due process in the Nevada proceeding by any of the following procedural discrepancies:

A. Exclusion of one of petitioners as an appellant by virtue of the omission of its name from an Amended Notice of Appeal although it was included in the original Notice of Appeal?

B. Refusal to file part of the record prepared late because an officer of the court held all of a corporate party's assets and did not make funds available?

C. Denial of effective aid of counsel where parties and the court have notice of temporary incapacity of counsel for a party due to illness and hospitalization at a time when such party was subject to a receivership?

The Constitutional Provisions Involved.

The pertinent provisions of The United States Constitution are the portion of §1, Amendment XIV as follows:

". . . nor shall any State deprive any person of life, liberty or property without due process of law;"

and the full faith and credit clause of §1, Article IV.

Statement of the Case.

A. Orders of the Trial Court.

The orders of the trial court which were affirmed by the Supreme Court of Nevada by its judgments hereby sought to be reviewed on certiorari are as follows:

1. "ORDER APPROVING SETTLEMENT AGREEMENT AND ASSIGNMENT OF LEASE" filed February 26, 1965 by which the trial court authorized the receiver to settle the case [Rec. Vol. II, pp. 387-388; Appendix A hereto].

2. An Order filed May 4, 1965 granting without notice to petitioners a motion of the receiver to dismiss the counterclaims (pursuant to the settlement authorized by the order filed February 26, 1965 [Rec. Vol. III, p. 421; Appendix B hereto].)

3. An Order filed February 23, 1966 denying the motion to set aside the foregoing orders [Rec. Vol. III, p. 577; Appendix D hereto].

B. The Facts.

On October 1, 1959 Transcon acquired a steam and mineral lease from Salton Sea Power Co. [Rec. Vol. III, pp. 570-574]; said lease described ~~said~~ seven square miles. Transcon generated electricity from natural steam produced from beneath the surface of said land through a well drilled and cased somewhat is the manner of exploration for and production of oil and hydrocarbon gas (although not in the record, the said seven square miles includes over 25% of the estimated reserves of natural steam in the Imperial Valley. The Imperial Valley field is the second in the United States from which electricity has been sold commercially).

On June 19, 1962, said Transcon and respondent Western Geothermal, Inc., entered into an agreement reciting that the parties intended to enter into a joint venture whereby each would take part in exploration and development of geothermal steam; that Western would, upon execution of the agreement, pay $2,500.00 to Transcon to be applied by Transcon towards payment of current tax and trade obligations; that within 120 days Western would commence drilling or deepening the existing well on said lease (referring to the second well drilled on the property); that drilling by Western would be continued in accordance with good drilling practice until completion or abandonment, and in the latter event, that Western would commence drilling another well within 15 days; that within 6 months of completion it would commence, and within one year, complete wells ". . . . capable of producing geothermal energy sufficient to support a power contract under which a minimum of 12,500 kw of electricity could be continuously supplied on a commercial basis", and provided that Western would have 49% of net profits of any well it drilled and in the event that it drilled wells to support such a power contract, then Western would be entitled to 60% of net profits. Said agreement provided that Transcon could acquire an interest in nearby leases Western may acquire and prohibited assignment without consent of the parties thereto [Rec. Vol. I, pp. 107-112]. Western drilled one well prior to the filing of suit.

On August 9, 1963, plaintiff William Free filed his complaint in the matter sought to be reviewed hereby [Rec. Vol. I, pp. 1-4; Amended Complaint Vol. I, pp. 42-48] in the Second Judicial District Court, State of Nevada, in and for the County of Washoe, alleging that he was a stockholder of Transcon and

that other petitioners herein were directors and officers of Transcon and were wasting its only asset, to wit: said steam and minerals. (Transcon's only asset was said lease and claims to other leases per the June 19, 1962 agreement). Plaintiff petitioned for the appointment of a receiver of the "corporation assets" supported by affidavits of an officer and an attorney for Western [Rec. Vol. I, pp. 9-14].

A few days prior to the filing of the action, Western or its parent corporation advanced $50,000.00 to plaintiff on stock allegedly of Transcon (Ide's Depo. pp. 48-49, 52, Rec. one of two Volumes marked Vol. XI). Western moved for leave to intervene and join in "Plaintiff's prayer for the appointment of a temporary Receiver for Defendant, Transcontinental Power Company". [Rec. Vol. I, p. 22] and filed its Complaint in Intervention [Rec. Vol. I, pp. 36-38] seeking the appointment of a receiver and alleging that it held an interest in said lease by reason of said agreement dated June 19, 1962. Harry C. Levy was appointed as temporary receiver of the affairs and assets of Transcon on such petitions [Rec. Vol. I, pp. 49-50] and by order filed December 13, 1963 Salton Sea Power Company was added as a party to the within proceedings [Rec. Vol. I, p. 123]. Said Harry C. Levy, the receiver of Transcon, was appointed in an order naming him as Harry Levy, as the receiver of Salton Sea Power Company [Rec. Vol. II, p. 232, lines 3-6].

In December, 1964 the trial in the within matter was commenced but its conclusion adjourned from time to time [Rec. Vol III, pp. 426 and 457]. No findings of fact or judgment were made or given on the merits of the controversies.

On the receiver's petition [Rec. Vol. II, pp. 353 *et seq.*], filed after the hospitalization of counsel for peti-

tioners herein and heard by the court after notice to the court and all concerned of his automobile accident, operation and physical condition [motion to continue the trial, Rec. Vol II, pp. 384-385 and affidavit attached thereto of J. H. Bauer, M.D.], the court authorized the proposed settlement between the receiver and Western. By it the lease was assigned by the receiver to Western, drilling requirements contained in the June 19, 1962 agreement were waived and Transcon's interest under that agreement (40% upon performance by Western and more upon lack of performance) was reduced to 20% of profit on operation by Western and 20% of reservation on a farmout; Western agreed to pay $50,000.00 and to quitclaim or pay $150,000.00 [Rec. Vol. II, pp. 396-414]. Since all investment and costs are to be repaid (not amortized) a 20% carried interest is only ½ of a 40% working interest (plus interest).

Thereafter, pursuant to said agreement, on the receiver's *ex parte* motion, the counterclaims of petitioners therein were dismissed (App. B).

Of the $50,000.00, the receiver and his attorney were allowed $13,950.00 as fees [Rec. Vol. II, pp. 324-325, Vol. III pp. 527-532].

After obtaining the receiver's agreement dated March 19, 1965 pursuant to the court order of February 26, 1965 eliminating the drilling requirements contained in the joint venture agreement and obtaining releases of clouds on the title to the lease, Western and the lessor promptly made and entered into an agreement whereby the covenants of the lease requiring further drilling were waived [Rec. Vol. III, pp. 496-508].

Because of non-payment of costs (a problem caused by the existence of the receiver of Transcon), Trans-

con's then counsel was relieved on his motion [Rec. Vol. III, pp. 424-430]. There was some evidence that before he learned of the Amendment to the lease, he thought that the settlement was the best that could be done but he said he would have to resist [Rec. Vol. III, p. 469] and there was not an iota of evidence, that he had authority to or purported to settle. Petitioner Jackson first learned of the negotiations and settlement in late April 1965 [Rec. Vol. III, p. 473].

In August, 1965, Springer & Newton of Reno, Nevada and Roy B. Woolsey of Newport Beach, California became counsel for petitioners herein and promptly moved the court to vacate the orders above-mentioned [Rec. Vol. III, pp. 460-461], and thereafter filed various supporting documents [Rec. Vol. III, pp. 462-474; 483-511; 539-576].

In support of the motion to vacate, petitioners contended that the February 26, 1965 and May 4, 1965 orders were beyond the jurisdiction of the court and deprived petitioners of due process of law and those orders and the receiver's settlement agreement were procured by fraud and mistake.

The fraud and mistake consisted of the representation that the lease would be lost for failure to drill (Western's obligation) if the receiver did not settle the controversies and the fact that immediately upon such settlement and elimination of the covenant in the June 19, 1962 agreement requiring Western to drill, Western entered into said amended lease with the lessor referred to above whereby the covenant of the lease requiring drilling was eliminated. Western represented to the receiver's attorney that the lease would be lost (Rec. Vol. III, p. 494, lines 16-32; also the attorney for the receiver testified that a notice of default had been served, see the one of two volumes marked XI containing the Reporter's Transcript of December, 1965

oral proceedings, p. 125, lines 7-12 [the Nevada Supreme Court said Vol. XI was not a part of the record although petitioners herein moved that court for the late filing of it upon grounds that they lacked funds with which to pay for the same because of the receivership]). The receiver so believed (said one of two volumes marked XI, pp. 106-108). The court so believed [Rec. Vol. III, p. 579]. In any event, the receiver did not demand that intervenor drill and did not make any effort to obtain another operator. As a matter of fact he could not have done so because he held the interest of Transcon only and not the interest held by Western pursuant to the venture agreement in and to the Nelson lease. The receiver admitted that had he known the lessor would waive the drilling requirement, the receiver would have acted differently (said one of two volumes marked Vol. XI, pp. 109-110). Western contended in its brief that there was "no doubt, . . . that absent such agreement, Transcon and Salton Sea would lose all rights in the . . . lease" (Resp. Br. Nev. S. Ct. p. 5, lines 18-28).

C. Petitioners Are Proper Parties on Certiorari.

At all times since the filing of the suit in the District Court, appellant Owen E. Jackson was and now is a stockholder, director and president of Transcon. The other individual petitioners are stockholders and directors. The Supreme Court of Nevada held that the foregoing persons were proper parties appellant to urge on behalf of Transcon the position claimed on its behalf therein (Appendix E).

Transcon was the corporate party whose assets were directly effected and as such is a proper party. Remedies on its behalf were exhausted on the appeal to the Supreme Court of Nevada whether Transcon be considered an actual appellant or not. Transcon was named

as an appellant in a Notice of Appeal served on all parties and mailed to the District Court Clerk by Roy B. Woolsey, California counsel admitted for purposes of the within matter in the proceeding in Nevada [Motion and Petition Rehearing Rec. Vol. XII, pp. 7, 8, 110 *et seq.*]; he requested Nevada counsel to file the required bond. Within the time permitted for taking appeals, the bond, filing fee and an "Amended Notice of Appeal" were filed (Rec. Vol. III, p. 588); through some unexplained inadvertence the name of Transcon was omitted therefrom. The motion to have the original Notice of Appeal deemed filed or the Amended Notice of Appeal be amended to include the name Transcon was not ruled on by the Supreme Court of Nevada although, as pointed out in the Order Denying the Petition for Rehearing, that court had struck a stipulation of the parties with respect thereto [Rec. Vol. XII, pp. 125 *et seq.*]

D. The Federal Questions Sought to Be Reviewed Were Raised Timely and Properly.

The violation of due process was argued in the points and authorities filed in the trial court on October 19, 1965 in support of the motion to set aside or modify the prior orders [Rec. Vol. III, p. 488], in oral argument on that motion [Vol. XI Rep. Tr.] and in the additional written argument filed February 7, 1966 where it was said:

> "We think for a receiver in an action to assign the interest of one of the parties or compromise it by an agreement with the other party who has an interest in the same property prior to a full trial and determination of the rights of the parties violates Amendment XIV to the United States Constitution, wherein the same provides: ". . . nor shall any state deprive any person of life, liberty or property without due process of law. . . ." [Rec. Vol. III, pp. 543, 544].

It was pointed out to the trial court that the orders decided title to and yet did not bind the parties as to title to California real property [Rec. Vol. III, pp. 491-492].

In petitioners' "Appellants' Opening Brief" in the Nevada Supreme Court filed September 7, 1966 [Rec. Vol. XII, pp. 40 *et seq.*], it was contended that the temporary receiver of the assets of a party to the litigation cannot make and enter into a settlement agreement with the other party to the litigation (in which a receiver was appointed) settling and disposing of the litigation without a trial on the merits [Op. Br. p. 12; Rec. Vol. XII, pp. 40 *et seq.*]; that "The authorization for the receiver to settle the litigation, the dismissal of counterclaims on the receiver's motion, and refusal to accept proofs and try the cause constituted an erroneous delegation of judicial powers beyond the jurisdiction of the court" [Op. Br. p. 13; Vol. XII, pp. 40 *et seq.*]; that making a new contract between the parties was beyond the jurisdiction of the court citing many cases [Op. Br. p. 16; Rec. Vol. XII] and *Siemon v. Russell,* 194 Cal. App. 2d 592, 15 Cal. Rptr. 218 (p. 9 Appellants' Reply Brief); that "The orders, settlement agreement and the court's refusal to receive proofs and try the cause constituted a deprivation of property without due process of law" [Op. Br. p. 17; Rec. Vol. XII, pp. 40 *et seq.*] and the due process of law clause of the XIV Amendment of the United States Constitution was quoted (p. 18); we stated that in *Hosford v. Henry,* 107 Cal. App. 2d 765, 238 P. 2d 91, the court pointed out that a court normally cannot delegate to a receiver the judicial functions of determining the litigation on the rights betwen the parties. It was stated that the Nevada court did not have jurisdiction to determine title to real property in California [Op. Br. pp. 21-22; Rec. Vol. XII, pp. 40 *et seq.*] citing *Universal Oil Land Co. v.*

[Rec. Vol XI

Gates, 117 Cal. App. 363, 2 P. 2d 1034 and *Melvin v. Carl,* 118 Cal. App. 249, 4 P. 2d 954).

The opinion below states that due process was an issue (Appendix E) and it was urged in Point 4 in the Petition for Rehearing that the receiver's holding the assets and other facts deprived petitioners of due process [Rec. Vol. XII, pp. 110 *et seq.*].

Argument Amplifying the Reasons Relied on for the Allowance of the Writ.

A receiver *pendente lite* is a drastic remedy and obviously impairs the ability of the corporation whose assets are taken by the receiver to defend itself. Where a receiver is appointed upon the application of a party to a dispute as to a venture agreement, the corporation whose assets are taken by the receiver is put at an undue disadvantage in connection with the preservation of its rights with that other party.

In criminal proceedings we recognize without question not only the right of the accused to counsel, but the duty of society to provide counsel for him. Where a court has appointed a receiver to take over the assets of a person or corporation, a special duty arises in connection with the preservation of the rights of that party. This is not a case involving merely mismanagement of the affairs of a corporation in its relationships with persons not parties to the lawsuit where the receiver is at liberty to deal with those persons.

The receiver took charge of the assets of Transcon, including its interest pursuant to the venture agreement in and to the Nelson mineral and steam lease. The receiver did not purport to have, and the Nevada Supreme Court pointed out that he did not purport to hold, the interest of Western in and to that lease. He was not in a position to deal for the preservation of

Transcon's interest except with the co-venturer Western. With this handicap there was no pretext that he endeavored to bring in a third person to save the lease, he simply negotiated a different arrangement—a new contract with Western.

If a lease is about to be lost for failure to drill and a dispute of the two parties who own the lease prevents either from going forward, a receiver appointed on the application of either should have the interest of both parties. He can then sell the lease reserving a royalty. Both parties then would have an opportunity to bid and to induce others to bid in hopes of obtaining the lease and operating it. The reserved royalty or other interest and cash would be available for the parties, subject to their rights as determined upon adjudication by the court. However, if the receiver has the interest of one party only, bids by that party and independent parties are not available (unless some party wants a fractional interest in the lease with the other party holding an interest). A bid can not be expected on the interest of one party only particularly if its nature and extent is subject to unadjudicated claims in the law suit. With the uncertainty as to the interest of party whose claim is in receivership the other party is given an unfair advantage for only by an agreement with him (or an order subjecting his interest to the receivership) can anything be done with the lease.

Under the judgments and decisions complained of herein, in any dispute between cotenants, joint venturers, or partners where one party's interest is subjected to a receivership (for alleged mismanagement, insolvency or other reason) and the preservation of the subject of the litigation requires labor or capital or appears in jeopardy for other reasons, the receiver can sell the interest he holds to the other party at less than its value. Often the operator of oil or mining property forms a

joint venture because he cannot finance the operations unassisted. Capital may drive a harsh bargain in coming into such a venture. Under the decisions complained of, the weak financial condition which made the opportunity possible for new capital justifies the appointment of a receiver and remaking the agreement even more favorably to the new capital. Courts should prevent anyone from making a deal to be financed largely on the strength of the project and then freezing others out.

The door should not be open to the abuse committed in this case, that is, the settlement upon the representation that the lease would be lost for failure to drill if the action not be settled and then immediately upon the consummation of the agreement making an agreement with the lessor that no drilling is required. Such constructive or actual fraud will be prevented by recognizing that a property right cannot be taken without a trial and adjudication upon the merits of litigation justifying forfeiture or a partial forfeiture.

Until June 19, 1962 intervenor had no interest in the steam, minerals or the lease and by the agreement bearing that date it acquired a right to earn a position. If it drilled (at its expense) wells producing enough steam to support a power contract for the continuous production of 12,500 kw of electricity it would have a 60% interest. In 1962, as Western Geothermal knew, Transcon had no funds with which to drill. It had expended large sums in producing steam and experimenting on the leasehold. Respondent Western completed one well by January 10, 1963, and one well in 1964. Neither was tested sufficiently to prove commercial production before the making of the orders complained of. Without a trial as to its performance or breach, the receiver assigned the lease to Western. There was no trial on the issue of whether William Free was a stockholder and no cross-examination of witnesses on that issue.

The above-mentioned facts concerning the economic plight of Transcon and how Western got its foot in the door make the difficulty of prosecuting Transcon's rights apparent. The receiver took the assets of Transcon thereby depriving it of any way to raise funds with which to protect itself and deprived its shareholders of means of raising funds to come to the aid of Transcon. Toy Gregory, counsel for Transcon at the time the first two orders were made, withdrew as counsel upon a motion supported by affidavits that his client had not reimbursed him fully for costs. The receiver made no demand that Western or third parties drill [one of two volumes marked XI, pp. 121-123] and no attempt to take possession of the interest of both parties to the venture so he could deal with third parties. He gave part of Transcon's interest allegedly to save the lease from forfeiture for non-drilling (when drilling was the obligation of Western). He also agreed to dismiss Transcon's counterclaim for damages for breach of the drilling obligations. Western benefited by its own wrong.

The first and second questions presented concerning the foregoing are: Can a state court or a temporary receiver of one party appointed on the application of another party to a lawsuit remake the contract between the parties to such suit? These questions should be answered negatively. A few of the cases stating that courts do not have jurisdiction to make a new contract or rewrite a contract for the parties are: *Douglass v. Douglass* (1874), 21 Wall. 98, 88 U.S. 98, 22 L. Ed. 479, 481 (reversing Supreme Ct., D.C.); *Florida Canada Corporation v. Union Carbide Corporation* (U.S. C.A. 2nd Cir. 1960), 280 F. 2d 193, cert. den. 81 S. Ct. 234, 364 U.S. 902, 5 L. Ed. 2d 194 (p. 196: "The courts do not write contracts for the parties nor . . . read into . . . contract . . . words or provisions it does not contain"); *Frankfort Oil Company v. Snokard*

(U.S.C.A., 10th Cir. 1960), 279 F. 2d 436, 444, cert. den. 81 S. Ct. 283, 364 U.S. 920, 5 L. Ed. 2d 259 (p. 444: courts are ". . . without power to rewrite the contract for the parties . . ."); *National Tea Co. v. Weiss* (U.S.C.A. 7th 1965), 341 F. 2d 331, 334 (court "could not itself write a contract for the parties avering the missing essential elements); and *Siemon v. Russell,* 194 Cal. App. 2d 592, 15 Cal. Rptr. 218, S. Ct. hear. den.

Whether the rule that courts cannot make or remake a contract is secured by the due process clause is an issue of importance. We contend that this rule is secured to the parties by the due process clause of The United States Constitution in part because it is established that refusal to recognize the obligations to a contract between litigants denies them due process of law. It was so held in *Hartford A & J Co. v. Delta Pine Land Co.,* 292 U.S. 143, 149, 54 S. Ct. 634, 78 L. Ed. 1178, 1181, where the court said that a state court could not enlarge the obligation of a party to a contract to accord with every local statutory policy solely on the ground that one of the parties is its own citizen. That case involved a contractural limitation of the time to bring a suit on an insurance policy. A similar contract providing for a limitation of time within which to sue was given protection under the due process clause, XIVth Amendment to The United States Constitution in *Home Ins. Co. v. Dick,* 281 U.S. 397, 50 S. Ct. 338, 74 L. Ed. 926, 74 A.L.R. 701, reversing the decision of a state supreme court. To the extent that statutory policy was held in these cases not to justify refusal to enforce such a contractural limitation, they may no longer represent the law. See *Clay v. Sun Ins.,* 363 U.S. 207, 480 S. Ct. 1222, 4 L. Ed. 2d 1170, and the dissent therein by Justice Hugo L. Black concurred in by Chief Justice Earl Warren and Justice William O.

Douglas. However, the principle of *Home Ins. Co. v. Dick* that contractural rights are within the protection of the due process clause seems unassailed (subject to the effect of the police power). Other cases holding contractural rights are protected by the due process clause are: *Lynch v. U. S.*, 292 U.S. 571 at 579-580, 54 S. Ct. 840, 78 L. Ed. 1434, 1441; *Lamb v. Powder River Live Stock Co.* (C.C.A. 8th 1904), 132 Fed. 434, 439, and *Holderness v. Hamilton Fire Insurance Co. of New York* (D.C.S.D. Fla. 1944), 54 F. Supp. 145.

Furthermore, a cause of action is property within the due process clause contained in Amendment XIV to the United States Constitution; *Martinez v. Fox Valley Bus Lines* (D.C. Ill. 1936), 17 F. Supp. 576, and *Terraccoiona v. Magee*, 148 A. 2d 68, 53 N.J. Super. 557.

Question three presented is: prior to a judgment on the merits of a controversy between parties, can the court delegate to a receiver authority to settle the very litigation in which he was appointed and by the settlement deny to the litigants a trial on the merits. The very essence of due process involves notice and an opportunity to be heard. For a receiver to be appointed and settle the litigation denies a hearing on the merits as to performance and non-performance of the parties. In this case a trial as to whether or not Western had sufficiently performed to be entitled to retain its interest in the lease was refused. Transcon's pleadings asserted that Western had not drilled diligently as required by the contract and had no rights in the lease. This issue should have been tried. In *Hosford v. Henry*, 107 Cal. App. 2d 765, 772, 238 P. 2d 91, 96, the court pointed out that a court normally cannot delegate to a receiver the judicial function of determining the litigation on the rights between the parties. Certiorari should be granted to determine this important issue.

The fourth question is can a receiver appointed in an action in one state convey or alter title to land in another state without ancillary appointment or court order in the state where the land is situated?

Custom and practice provides for ancillary receiverships in jurisdictions where the property is located. The Nevada court did not have jurisdiction to determine title or permit a receiver to alter title to real property in California and it was so held in *Universal Oil Land Co. v. Gates,* 117 Cal. App. 363, 3 P. 2d 1034, and *Melvin v. Carl,* 118 Cal. App. 249, 4 P. 2d 954. See also, *Hosford v. Henry* cited above.

We say that this rule is protected under the United States Constitution. The importance of granting a writ in this case is made clear by this Honorable Court's decision in *Durfee v. Duke,* 375 U.S. 106, 84 S. Ct. 242, 11 L. Ed. 2d 186. The petitioners on certiorari to the United States Supreme Court had brought a prior action against respondents in Nebraska to quiet title to real property. This Honorable Court said:

> "The Nebraska court had jurisdiction over the subject matter of the controversy only if the land in question was in Nebraska . . . respondent appeared in the Nebraska court and through counsel fully litigated the issues. . . ." (375 U.S. 107-108, 84 S. Ct. 243.)

This Honorable Court pointed out that the Nebraska decision in favor of petitioners was *res judicata.* It appears from *Durfee v. Duke* (and in the C.C.A. Opinion, 308 F. 2d 209, 210-211), that the Nebraska court had *in personam* jurisdiction and nevertheless its jurisdiction was said to depend on whether or not the land was in that state.

Even if the rule that jurisdiction depends upon the land's being within the state applies to *in rem* rather

than *in personam* proceedings, the act of a receiver is *in rem* and justified by the principles of law applicable to *in rem* proceedings; for that reason, receivers of corporations having assets in states other than the state in which appointed apply for an ancillary appointment in the state where the property is located.

In *Pennoyer v. Neff,* 95 U.S. 714, 720, 24 L. Ed. 565, 568, the court said:

> "The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse."

In *Huntington v. Attrill,* 146 U.S. 657, 669, 13 S. Ct. 224, 36 L. Ed. 1123, 1128, it was said:

> "Proceedings *in rem* to determine the title to land must necessarily be brought in the State within whose borders the land is situated, and whose courts and officers alone can put the party in possession."

In *Scott v. McNeal,* 154 U.S. 34, 45-46, 14 S. Ct. 1108, 38 L. Ed. 896, 901, it was ably said:

> "No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice. . . ."

If with jurisdiction over the person, the court cannot quiet title to land outside its jurisdiction, certiorari should be granted so such can be so held unhampered by the out of state decree which was *res judicata* in *Durfee.* If the rule against jurisdiction over out of state land is generally limited to *in rem* proceedings, it should apply to acts of receivers anyway. Whether a court with jurisdiction over the person can authorize a receiver to sell or alter title to out of state property is a question of great public importance.

Opinions and Judgments Appended.

Copies of the Opinion of the District Court, the Opinions of the Supreme Court of Nevada, the three orders of the District Court, and the two judgments of the Supreme Court sought to be reviewed are appended hereto in chronological order.

Conclusion.

Each of the jurisdictional questions presented is a question of importance and substance not heretofore decided by the Supreme Court of the United States and decided herein in a way not in accord with law and decisions to the extent applicable.

For the reasons set forth hereinabove, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

ROY B. WOOLSEY and
GILBERT W. BOYNE,
Attorneys for Petitioners.

APPENDIX A.

Order Approving Settlement Agreement and Assignment of Lease Made on February 26, 1965, in the District Court.

In the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

William Free, Plaintiff, Western Geothermal, Inc., Intervenor, vs. Transcontinental Oil Co., Inc. of Nevada, now known as Transcontinental Power Company, George Ditson Jones, George H. Howell, Jr., Winona L. Jackson and Owen E. Jackson, and Salton Sea Power Company, a Nevada corporation, Defendants. Case No. 207 209.

ORDER APPROVING SETTLEMENT AGREEMENT AND ASSIGNMENT OF LEASE.

The above entitled matter coming on regularly this day for hearing, and it appearing that due and proper notice has been given of the time and place of the hearing in accordance with the Order of the Court dated February 10, 1965, and it further appearing that no objections to the granting of the Petition of the Receiver dated February 8, 1965, requesting the approval of a certain Agreement and Assignment of Lease have been filed as required in the Court's Order of February 10, 1965, and the Court being fully advised in the premises and it appearing to the Court from all of the evidence presented to the Court at the trial of this action and by way of representations of counsel for the petitioner and for the Intervenor that it would be for the best interests of the stockholders of Transcon-

tinental Power Company and of Salton Sea Power Company that the Receiver enter into this Agreement, said Agreement appearing to the Court under all the evidence thus far presented to the Court to be a fair and proper one so far as the Salton Sea Power Company and the Transcontinental Power Company are concerned;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

I.

That the Petition of Harry C. Levy for the approval of the Settlement Agreement and Assignment of Lease, marked Exhibit A and annexed to the Petition, be, and the same hereby is, granted.

II.

That by stipulation of counsel for the Intervenor and for the Receiver the date set forth on line 7, page 8 of the Settlement Agreement, which composes a part of Exhibit A, in paragraph 6 thereof, be changed from February 26, 1965, to March 26, 1965 by interlineation.

III.

That Harry C. Levy be, and he hereby is, authorized to forthwith, subject to the change of date indicated in paragraph II above, sign both the Agreement and Assignment of Lease as set forth in Exhibit A and deliver the signed copies to a proper officer of Western Geothermal, Inc. for its signature, and thereafter to file one (1) copy executed by all parties with the Clerk of the above entitled Court.

Dated this 26th day of February, 1965.

/s/ Grant L. Bowen
District Judge.

APPENDIX B.

Order of the District Court Dated May 4, 1965, Dismissing Counterclaims.

[Title of District Court and Cause.]

Upon Motion, made by Harry C. Levy, acting in his capacity Receiver, of Transcontinental Power Company and Salton Sea Power Company, two of the Defendants above named, and good cause appearing therefore,

It is Ordered, Adjudged and Decreed that the Counterclaims of the said Transcontinental Power Company and Salton Sea Power Company, be, and the same are hereby dismissed.

Dated this 4th day of May, 1965.

/s/ Grant L. Bowen
District Judge

Boyd and Leavitt
/s/ By: William E. Friedman
Attorneys for Receiver
Eight Eleven Sahara
Las Vegas, Nevada

[Rec. Vol. III, p. 421]

APPENDIX C.

Decision of the District Court Dated February 23, 1966, on Motion to Set Aside Orders.

[Title of District Court and Cause.]

On August 25, 1965, defendants moved the Court to set aside that certain Order heretofore made on the 26th day of February, 1965, which Order, among other matters, after reciting the giving of due and proper notice, approved a certain settlement agreement and assignment of a lease, copies of which were attached to the Petition of Receiver Harry C. Levy praying for approval. In general, the grounds for the Motion to set aside the Order of February 26, 1965 were that the then attorney of record, Toy E. Gregory, Esq., was indisposed, that the Order was entered by reason of mistake, inadvertence, surprise or excusable neglect of defendants and their counsel, and that the majority interests of the corporate defendants were not represented in the execution of the agreement, and that such agreement was not in the best interests of the defendant corporations or their stockholders.

[Rec. Vol. III, p. 578]

At the onset, it is to be noted that no objections were made or filed to the Receiver's Petition to approve the new agreement.

Thereafter all the subsequent proceedings, including the taking of oral testimony, the making of offers of proof, the filing of affidavits, were submitted for and on behalf of the defendant corporation in support of its contention that the February 26, 1965 Order was not only improperly entered, but that the new agree-

ment was grossly unjust to the defendant corporation. While the procedures generally followed have not been in accordance with rules of practice, as set forth in this District, I have overlooked those discrepancies. Accordingly, it would seem that the propositions advanced by defendants go to the two necessary showings that a "defaulted" defendant must make, to-wit, (1) surprise, mistake, inadvertence or excusable neglect, and (2) that a good and meritorious defense exists with the contention that the approved agreement should be placed in this category.

Counsel for defendants has made a very impressive presentation in support of the Motion. Yet, I recall that a very convincing case was made for the appointment of a receiver, a demand that something be done to avert the very real threatened forfeiture of the lease. I recall, also, that there was no money and no one was able to come up with any finances except the Intervenor through its parent, Natomas, Inc. It is said that fraud was practiced upon the Court when it was told that the lease would be cancelled immediately because a new lease was entered into not too long after February 26, 1965, and that the same had been contemplated for some time. That may or may not be true, but the fact remains that all the testimony produced at the trial of Intervenor-Defendant's portion of the case clearly showed a serious situation, situation

[Rec. Vol. III, p. 579]

where, if the lease were cancelled, everybody would be a loser.

As to the excusable neglect contention, the record in this connection is not convincing. There is no question

but what Mr. Gregory, or his firm, received notice of the hearing and that he, or his firm, ever requested any extension of time to prepare or present objections to the Receiver's Petition. It is true that he moved for a continuance, but that was directed to further trial setting, said trial to begin once again on March 9, 1965. That Motion was granted. Because of those factors and the fact that Mr. Gregory had become convinced that the Receiver's proposed agreement was the best possible arrangement, I do not believe that this is a case where a proper showing has been made under the provisions of N.R.C.P. 60, which sets forth the procedure for setting aside so-called defaults.

It is rather significant that counsel for plaintiff never entered any objection to the Receiver's request to approve a new agreement and assignment and, in fact, has not joined in the defendant's Motion to vacate the February 1965 Order. In any event, I am of the opinion that the Order of February 26, 1965 should not be set aside, that the matters presented upon the merits of the defendants' claim come too late and are not relevant to a hearing of this kind, and that the offers of proof should be denied.

It is, therefore, ORDERED that defendants' Motion of August 25, 1965, be and the same hereby is, denied. An Order is being filed in accordance with this decision.

Dated this 23rd day of February, 1966.

Grant L. Bowen
District Judge

[Rec. Vol. III, p. 580]

Appendix C.

APPENDIX D.

Order of the District Court Dated February 23, 1966, Denying the Motion to Set Aside Orders.

[Title of District Court and Cause.]

This cause came on to be heard on the Motion of defendants to set aside that certain Order heretofore made in the above-entitled action on February 26, 1965, and good cause appearing therefor

It is Hereby Ordered that the Motion to set aside default filed August 25, 1965, be denied.

Dated this 23rd day of February, 1966.

Grant L. Bowen
District Judge

[Rec. Vol. III, p. 577]

APPENDIX E.

Opinion of the Supreme Court of the State of Nevada Dated January 9, 1967, Affirming Trial Court Orders.

In the Supreme Court of the State of Nevada.

George Ditson Jones, George H. Howell, Jr., Winona L. Jackson and Owen E. Jackson, Appellants, v. William Free, Respondent, Western Geothermal, Inc., Intervenor and Respondent. No. 5107.

OPINION.

Collins, Justice.

This is an appeal by George Ditson Jones, George H. Howell, Jr., Winona L. Jackson and Owen E. Jackson, defendants below and officers and directors of Transcontinental Oil Co., Inc, a Nevada corporation, from various orders of the trial court. The orders complained of are: (1) an order entered by the trial court authorizing Harry C. Levy, receiver of Transcontinental Oil Co., Inc., to settle a controversy with Western Geothermal, Inc., Intervenor; (2) an order dismissing appellants' counterclaims; (3) an order denying the setting aside of the foregoing two orders. Transcontinental apparently held a lease on some land in Imperial Valley, California, valuable for production of steam from wells. It entered into a joint venture contract concerning the leasehold interest with Western Geothermal for purposes of development of the steam to produce electrical energy and other byproducts. Transcontinental encountered financial problems, and was beset with internal difficulties among the officers, directors and stockholders. It also became ensnarled in

a controversy with Western Geothermal over their contract.

William Free, a substantial stockholder of Transcontinental, commenced this action, which among other things, sought the appointment of a receiver of Transcontinental pursuant to NRS Chapter 78. Western Geothermal was permitted to intervene and joined in the relief requested. Harry C. Levy of Las Vegas, Nevada, was appointed and qualified as receiver. His appointment was immediately attacked for various reasons, but was sustained by this court in Transcontinental Oil Co., Inc. of Nevada v. Free, 80 Nev. 207, 391 P.2d 317 (1964).

Following that decision the receiver embarked upon his duties on behalf of Transcontinental under supervision of the district court. Transcontinental had no assets except the leasehold interest in the steam lands. The record indicates some evidence of a default procedure by the owner and lessor of the steam lands because of failure to perform in accordance with the terms of the lease. There were liens and claims against the steam land for unpaid taxes, judgments and other proceedings clouding the title which were the obligation of lessee to correct. The receiver needed money to correct those problems, but had none. Finally, after considerable negotiation among the receiver and his attorney, Western Geothermal and its attorney, the appellants through their attorney of record, Toy Gregory, Sr., Esquire, of Las Vegas, a form of agreement was reached dealing with the leasehold interest and particularly the joint venture agree-

ment between Transcontinental and Western Geothermal. The new agreement provided, among other things, that Western Geothermal would pay over immediately $50,000 to the receiver to permit him to meet expenses of the receivership and to clear up clouds on the title of the leasehold property. There is no question that the agreement substantially modified the rights of Transcontinental and Western Geothermal under the original joint venture agreement, particularly in the area of drilling requirements and the nature and type of interest retained by Transcontinental. The agreement also provided for dismissal of counterclaims pleaded by Transcontinental against Western Geothermal and Free.

Receiver petitioned the district court for authority to execute the agreement. It is admitted by the parties and the count expressly found that notice of the hearing of the petition was given to Mr. Gregory as attorney for appellants. A day or so before the hearing Mr. Gregory had been seriously injured in an automobile wreck. Appellants neither in person nor through their counsel appeared at the hearing. Mr. Gregory made no request for continuance because of his accident or injuries. At the hearing the receiver appeared with his counsel and testified, urging the court to grant him authority to execute the agreement. Western Geothermal, through its counsel, likewise appeared, examined the receiver and joined in urging the court to grant authority to the receiver to enter the agreement. The court gave its permission. The agreement was executed by the parties. Western Geothermal paid over the $50,000 and the receiver went about clearing the

clouds on the title of the leasehold property and satisfying the expenses of the receivership.

Subsequently the trial court dismissed the counterclaims of Transcontinental and Salton Sea against Free and Western Geothermal as a condition of the agreement it had allowed the receiver to enter. Its first order was made ex parte. On appellants' motion to reconsider the order with proper notice to all parties, it reaffirmed its order of dismissal, and ruled there were no further issues to be tried in the lawsuit. Appellants and other parties were then served by Western Geothermal with a document entitled "Notice of Entry of Judgment," which appellants contend commenced the time running within which they could take appeal to this court from final, appealable orders of the trial court.

We conclude the errors complained of by appellants are not well taken and affirm the orders of the court below.

The question of the appointment of Harry C. Levy as receiver of Transcontinental under NRS Chapter 78 is res judicata and appellants are bound thereby. That very question was ruled upon by this court in Transcontinental Oil Co., Inc. of Nevada v. Free, supra, at page 210-211, 391 P.2d at page 319, where we said:

"Finally, Transcontinental insists that Free did not make a proper showing to justify the appointment of a receiver and that the district court abused its discretion in granting his request. This argument is not entitled to credit. NRS 78.650(1) lists 10 circumstances, any one of which will authorize the appointment of a temporary receiver upon application by a holder of 10% of

the outstanding stock. For the purposes of this opinion it is sufficient to note that Free alleges four of them in his amended verified complaint. The affidavit of Kenneth P. Dillon alleges one of them, viz., danger to the public. Clearly, the showing was sufficient. International Life Underwriters, Inc. v. Second Judicial District Court, etc., 61 Nev. 42, 113 P.2d 616, 115 P. 2d 932." The very point being once raised and ruled upon, we will not consider it further. Tomiyasu v. Golden, 81 Nev. 140, 400 P.2d 415 (1965). There was (1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons and of parties to the action; (4) identity of the quality in the person for or against whom the claim is made. Smith v. Gray, 50 Nev. 56, 67, 250 P. 369 (1926).

The orders, which are in a sense final orders and terminate the litigation, are appealable. NRCP 72(b)(1)[1]; 4 C.J.S. Appeal and Error § 132, nn. 40.5, 45.15, § 147, n. 84; State ex rel. Unemployment Compensation Board etc. v. Burton, 112 Ind.App. 268, 44 N.E.2d 506, 508 (1942); Jordan v. Burbach, 330 S.W.2d 249, 252 (Tex.Civ.App., 1959); Northern Nevada Loan Association v. John H. Cazier & Sons Co., 49 Nev. 115, 118, 239 P. 395, 396 (1925); cf. Alper v. Posin, 77 Nev. 328, 363 P.2d 502 (1961); Nevada First National Bank of Tonopah v. Lamb, 51 Nev. 162, 271 P. 691 (1928). Appellants, so far as the record reveals, are officers and directors of Transcontinental, and as such are entitled to entertain this appeal. This court said in Golden v. Fifth

[1]NRCP 72 "(b) Appealable Determinations. An appeal may be taken:

"(1) From a final judgment in an action or proceeding commenced in the court in which the judgment is rendered."

Judicial District Court, Mark R. Averill, Judge et al., 31 Nev. 250, at page 263, 101 P. 1021, at page 1026 (1909): "We think, however, that the directors are necessary parties. They of necessity have a financial interest in the corporation, and are the ones who are intrusted with its management by the stockholders. * * * An order dissolving a corporation and placing its affairs in the hands of a receiver, not only effects a radical change in the legal status, but ousts the control of its affairs by the board of directors as such."

Appellants complain most strongly about the trial court's order authorizing the receiver to enter a compromise agreement on behalf of Transcontinental with Western Geothermal concerning the joint venture contract relating to the leasehold interest in the steam lands. Pursuant to this same agreement the counterclaims were dismissed and the litigation for all intents and purposes ended. Appellants say the action of the trial court; (a) constituted an erroneous delegation of judicial power beyond the jurisdiction of the court; (b) constitution the making of a new contract between the litigants; (c) deprived them of property without due process; (d) exceeded the powers of the receiver who they contend had powers only under NRS Chapter 32 and not NRS Chapter 78.

The last point is quickly disposed of because the appointment was clearly under NRS Chapter 78, approved by this court in Transcontinental Oil Co., Inc. of Nevada v. Free, supra, and is res judicata.

We note that NRS Chapter 78 deals exclusively with private corporations, not joint adventurers, individuals, partners or otherwise. Transcontinental Oil Co. ad-

mittedly is a private Nevada corporation, and so far as the receivership is concerned is the only corporation (even though a party to the joint venture agreement with Western Geothermal) for whom receivership was sought. To say that a receiver appointed to handle the affairs of one private corporation could, without more, also deal in the same manner with the affairs of another private corporation (Western Geothermal) is without authority anywhere. It is said in Clark on Receivers, Third Edition, Vol. I, Sec. 11(a), pages 13 and 14:

"(a) Receiver appointed by court. A receiver appointed by the court is a person who by such appointment becomes an officer of the court to receive, collect, care for, administer, and dispose of the property or the fruits of the property of another or others brought under the orders of court by the institution of a proper action or actions.

"A receiver appointed by the court is an arm or hand of the court, and as said above, an officer of the court and a representative of the court.

"The court itself, having assumed jurisdiction, obtains by its orders the control of the property. The receiver is but the court's officer. He is subject to the court's directions and orders and in the discharge of his official duties is entitled to apply to the court for instructions.

"After the appointment of the receiver is effected, the relation of the receiver and the original defendant or owner is that of caretaker and owner."

[4] A receiver appointed by a court under NRS Chapter 78 has broad powers, subject of course to the

continuing supervision and approval of the court. NRS 78.635(2) sets forth that power and authority and states:

"(a) To demand, sue for, collect, receive and take into his or their possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes, and property, of every description of the corporation; and

"(b) To institute suits at law or in equity for the recovery of any estate, property, damages or demands existing in favor of the corporation; and

"(c) In his or their discretion to compound and settle with any debtor or creditor of the corporation, or with persons having possession of its property or in any way responsible at law or in equity to the corporation at the time of its insolvency or suspension of business, or afterwards, upon such terms and in such manner as he or they shall deem just and beneficial to the corporation; and

"(d) In case of mutual dealings between the corporation and any person to allow just setoffs in favor of such person in all cases in which the same ought to be allowed according to law and equity."

Subparagraph (c) specifically authorizes a receiver to "compound and settle with any debtor or creditor of the corporation, or with persons having possession of its property or in any way responsible at law or in equity to the corporation at the time of its insolvency or suspension of business, or afterwards, upon such terms and in such manner as he or they shall deem just and beneficial to the corporation; * * *." Clark on Receivers, Third Edition, in construing the power of re-

ceivers to compromise claims, says in Vol. 2, Sec. 366, page 623:

"When a receiver has been authorized by the court to collect claims, he does so as a part of the court's equitable power to preserve the res. In preserving the res the court exercises discretion, which may go so far as to determine that it is for the best interest of the receivership to accept part of a claim, rather than take a chance and suffer the hazard of a prolonged proceeding demanding the full amount. The court's order to a receiver to compromise a claim or claims should be very definite and clear."

In Vol. 3, Sec. 655, page 1147, he says:

"A receiver when administering or settling an estate of one kind or another, or operating a business under orders of court, is frequently confronted with the proposition: Shall he compromise a claim for or against the estate, or shall he sue or stand suit? If the receiver's order of appointment expressly authorizes the receiver to compromise such claims, then he must use his discretion and best business judgments as to matters too small to present to the court. However, it is better practice and the better part of wisdom to go to the court and ask the court's instructions as to compromising large or substantial claims. In addition to going before the court, it is further advisable to notify all parties or creditors who may be vitally interested in such a compromise. Although the receiver may not compromise claims without the order of court, nevertheless his acts of compromising claims subsequently may be ratified. * * *"

Appendix E.

Here the district court allowed the compromise proposed by receiver. It had substantial evidence before it, and we will not disturb its order. Furthermore, neither appellants nor their counsel appeared at the hearing and offered objection to it. They should not be heard to complain now.

Clark on Receivers, Third Edition, Vol. 2, Sec. 423, page 711, states: "The receiver by accepting the receivership does not adopt the contracts and obligations of the defendant." He cites as authority for that statement Peabody Coal Co. v. Nixon et al., 8 Cir. (1915), 226 F. 20. In that case receivers were appointed for a railroad company. The railroad had a contract with a coal company to purchase certain quantities of coal at a price determined by a complex formula. Receivers notified the coal company they would not be bound by the contract and asked the chancellor to approve their action. The coal company opposed the action of the receivers and sought to convince a master to whom the matter was referred for the taking of evidence, that the contract was in the best interest of the receivers and it should affirm the contract. In the meantime negotiations were undertaken between the receivers and the coal company to compromise the matter and reach a negotiated settlement. This failed. The court stated at page 22 of the report, "We had occasion in another case [Kansas City Southern Ry. Co. v. Lusk et al., 8 Cir., 224 F. 704] at this term to observe that it is not the rule that the contract of the owner of a trust estate is binding on the receivers until renounced, but, contra, that the receivers are not bound by the contract until they have affirmed it and assumed its burdens under

the direction of the court. We need not say much more. * * *". The court approved the receivers' renouncement of the contract in its entirety.

Clark on Receivers, Third Edition, further states, Vol. 2, Sec. 423, page 711. "Ordinarily, the court will not order the receiver to perform contracts which are not beneficial to the estate represented by the receiver." The record in this case indicates the receiver, considering all aspects of the problem facing Transcontinental, felt it was in the best interest of the company to compromise the claim it had against Western Geothermal under the joint venture agreement in the leasehold of the steam lands. This proposal was presented to the court for its instruction. The court approved and authorized the compromise. We see no error.

Other points were urged, but since they will not affect the result we decline to pass upon them.

Affirmed.

Thompson, *C. J.*, and Zenoff, *J.*, concur.

[Rec. Vol. XII, pp. 99 *et seq.*]

APPENDIX F.

Judgment of the Supreme Court of the State of Nevada Dated January 9, 1967, Affirming the Trial Court.

[Title of Supreme Court of the State of Nevada and Cause.]

Remittitur No. 5107

Appeal from Orders

This case came on regularly to be heard on the 2nd day of November, 1966 when Charles E. Springer, Esq. of the firm Springer & Newton and Roy B. Woolsey, Esq. of Newport Beach, California, counsel for appellants and John C. Bartlett, Esq. of the firm Vargas, Dillon, Bartlett and Dixon and William E. Freedman, counsel for respondents were duly heard in oral argument on the merits of the case for their respective clients.

Now, on this day, all and singular, the law and the premises having been seen, heard and duly considered and the court being fully advised of the law, files with the clerk of this court its opinion in writing by Collins, J. concurred in by Thomas, C. J. and Zenoff, J. to the effect:

"Affirmed."

Whereupon, it is Now Ordered, Adjudged and Decreed as quoted above.

Judgment entered this 9th day of January, 1967.

[Rec. Vol. XII, p. 128]

APPENDIX G.

Order (Constituting an Opinion) of the Supreme Court of Nevada Dated February 13, 1967, Denying Petition for Rehearing.

[Title of Supreme Court of the State of Nevada and Cause.]

Filed: Feb. 13, 1967.

ORDER

Per Curiam:

Appellants move for rehearing on four grounds. Rehearing is denied.

The first ground urged is that this court failed to act upon appellants' motion to allow Transcontinental Oil Co., Inc., to become a party appellant. A first notice of appeal tendered to the clerk of the district court included Transcontinental as well as Salton Sea Power Company as appellants. This notice was not filed because it was not accompanied by the proper fee nor the cost bond on appeal. The notice of appeal upon which this court assumed jurisdiction failed to include either Transcontinental or Salton Sea as parties appellant. Previously this court by order struck a stipulation and order by which appellants sought to amend the notice of appeal to include Transcontinental. To say we have failed to consider the matter is not supported by the record. Furthermore, there is authority dealing with an effort to substitute additional parties after a notice of appeal has been filed. It was held in

Cook & Sons Equipment, Inc. v. Killen, 9 Cir., 277 F.2d (1960), as follows:

"After the entry of judgment in favor of plaintiff, an appeal was taken in which the corporation alone was named as appellant. No mention of the individual defendants was made. After the lodging of the appeal, a motion was made by the individual defendants to have their names added to the notice of appeal on the ground that the omission was a clerical error. The omission here was much more than a clerical error. It was a failure of the individual defendants to appeal. We have no authority to amend a notice of appeal so as to bring in additional parties. * * * Rule 73(b) [virtually identical with NRCP 73(b)] requires that the notice of appeal specify the parties taking the appeal. Only the parties named in the notice of appeal are brought within the appellate court's jurisdiction. VII Moore, Federal Practice (2d ed. 1955) §§ 73.13, 73.14. The harmless error doctrine has no application to failure to name parties in a notice of appeal."

Points 2, 3, and 4, urged by appellants, were clearly disposed of by the decision and we see no reason or grounds for reconsideration of them.

Attached to this petition is a certified copy of the notice and proof of service referred to in point 1 of the petition for rehearing. This court held in Clack v. Jones, 62 Nev. 76, 141 P.2d 385 (1943), and in Estate of Powell, 62 Nev. 121, 140 P.2d 943 (1943), that no

document or paper other than the petition can be considered on motion for rehearing under Supreme Court Rule XV (now Rule 34). Therefore the certified copy of the notice and proof of service is stricken.

Rehearing denied.

Thompson, *C. J.*
Collins, *J.*
Zenoff, *J.*

CC:
Attorneys of Record

[Rec. Vol. XII, pp. 125 *et seq.*]

APPENDIX H.

Judgment by the Supreme Court of the State of Nevada Dated February 13, 1967, Denying Petition for Rehearing.

[Title of Supreme Court of the State of Nevada and Cause.]

On Petition for Rehearing

A decision having been rendered in the above-entitled case, counsel on behalf of appellants, within the time prescribed by the rules of this court, filed with this court a Petition for Rehearing.

Now, on this day, all and singular, the law and the premises having again been reviewed, seen, heard and duly considered, and the court being fully advised of the law files with the clerk of this court its opinion in rehearing by *per curiam* to the effect:

"Rehearing denied."

Whereupon, it is now ordered, adjudged and decreed as quoted above.

Judgment entered this 13th day of February, 1967.

SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 207

Office-Supreme Court, U.S.
FILED
JUL 31 1967
JOHN F. DAVIS, CLERK

OWEN E. JACKSON, GEORGE DITSON JONES, GEORGE H. HOWELL, JR., WINONA L. JACKSON and TRANSCONTINENTAL OIL CO., INC. of NEVADA, now known as TRANSCONTINENTAL POWER COMPANY, a corporation, *Petitioners and Defendants,*

vs.

WESTERN GEOTHERMAL, INC., a corporation, *Respondent and Intervenor,*

WILLIAM FREE, *Respondent and Plaintiff,*

and

HARRY C. LEVY, as Receiver of Transcontinental Power Company, SALTON SEA POWER COMPANY, and HARRY LEVY, as Receiver of Salton Sea Power Company, *Respondents.*

On Petition for Writ of Certiorari to the Supreme Court of Nevada

Brief of Respondent Western Geothermal, Inc. in Opposition to Petition for Writ of Certiorari

VARGAS, DILLON, BARTLETT & DIXON
JOHN C. BARTLETT
OWEN JAMESON
195 South Sierra Street
Reno, Nevada

Attorneys for Respondent and Intervenor, Western Geothermal, Inc.

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

	Page
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Argument	6
A. First Question	6
B. Second Question	7
C. Third Question	9
(1) First "Discrepancy"	9
(2) Second "Discrepancy"	10
(3) Third "Discrepancy"	11
Conclusion	12

TABLE OF AUTHORITIES CITED

Cases	Pages
Clark v. Williard, 292 U.S. 112 (1933)	8
Commonwealth of Pennsylvania v. Williams, 294 U.S. 176 (1935)	7
Converse v. Hamilton, 224 U.S. 243 (1911)	8
Cook & Sons Equipment, Inc. v. Killen, 277 F.2d 607 (9th Cir. 1960)	10
Fall v. Eastin, 215 U.S. 1 (1909)	9
Glasser v. Wessel, 152 F.2d 428 (2d Cir. 1945), *cert. den.*, 328 U.S. 839 (1945)	11
Harkin v. Grundage, 276 U.S. 36 (1928)	7
Nunn v. Feltinton, 294 F.2d 450 (5th Cir. 1961) *cert. den.*, 369 U.S. 817 (1962)	8, 9
Relfe v. Rundle, 103 U.S. 222 (1880)	8
Rozan v. Rozan, 49 C.2d 322, 317 P.2d 1 (1957)	9
Superior Oil Corp. v. Matlock, 47 F.2d 993 (10th Cir. 1931)	7
Transcontinental Oil Co. v. Free, 80 Nev. 207, 391 P.2d 317 (1966)	3, 4

Constitutions	
Federal Constitution, Article IV, § 1 (Full Faith and Credit clause)	8

Codes	
28 U.S.C. § 1257(3)	2
28 U.S.C. § 2106	2

Rules	
Supreme Court Rule 40(3)	2n
Federal Rules of Civil Procedure, Rule 73(b)	10

Texts	
17 Fletcher, Corporations, § 8562	8

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

OWEN E. JACKSON, GEORGE DITSON JONES, GEORGE H. HOWELL, JR., WINONA L. JACKSON and TRANSCONTINENTAL OIL CO., INC. of NEVADA, now known as TRANSCONTINENTAL POWER COMPANY, a corporation, *Petitioners and Defendants;*

vs.

WESTERN GEOTHERMAL, INC., a corporation, *Respondent and Intervenor,*

WILLIAM FREE, *Respondent and Plaintiff,*

and

HARRY C. LEVY, as Receiver of Transcontinental Power Company, SALTON SEA POWER COMPANY, and HARRY LEVY, as Receiver of Salton Sea Power Company, *Respondents.*

On Petition for Writ of Certiorari to the Supreme Court of Nevada

Brief of Respondent Western Geothermal, Inc. in Opposition to Petition for Writ of Certiorari

Respondent and Intervenor Western Geothermal, Inc. opposes the petition for writ of certiorari upon the ground that it does not present a substantial federal question, and it submits this brief in opposition to that petition.

JURISDICTION

Petitioners claim that this Court's jurisdiction is "believed" to be conferred by 28 U.S.C. § 1257(3) and § 2106. (Peti.*, p. 2)

This Court has no jurisdiction to review under those or any other statutes. Section 1257(3) relates to federal right and question jurisdiction. There is no federal question, much less a substantial one, in this case. Section 2106 merely empowers the Court to act with respect to matters "lawfully brought before it for review." Since this matter is not lawfully before the Court for review, that section is inapplicable.

QUESTIONS PRESENTED†

(1) A Nevada trial court appointed a receiver, under Nevada law, to handle the affairs of a Nevada corporation. The Nevada Supreme Court affirmed that appointment. Then the receiver negotiated a settlement of a claim the corporation had asserted against another. The Nevada trial court found the settlement to be fair, and approved it under Nevada law. Does that approval deny any petitioner anything without due process of law?

(2) The settlement provided, among other things, that the receiver was to assign to another an interest in a lease whose subject was California land. Can a Nevada court appointed corporate receiver make a settlement containing such a term without an ancillary administration in Cali-

---

*Petitioners "Petition for Writ of Certiorari to the Supreme Court of the State of Nevada" is referred to as "Peti."

†Petitioners have stated the questions presented by their Petition without reference to the facts presented by it. See Peti., pp. 2-3. Accordingly, respondent has undertaken to state those questions. See Sup. Ct. Rule 40(3). Respondent's question 1 relates to the subject of petitioners' questions 1-3; respondent's question 2 relates to the subject of petitioners' question 4; and respondent's question 3 relates to the subject of petitioners' question 5.

fornia, and, whether he can or can't, does his doing so deny any petitioner anything in violation of any federal constitutional rule?

(3) Do these "procedural discrepancies" (Peti. p. 3), which petitioners don't claim affected the result in any way, deny any petitioner anything without due process of law:

(a) The Nevada Supreme Court's not according the status of appellant to a party not named as appellant in the applicable Notice of Appeal.

(b) The Nevada Supreme Court's refusal to file a part of the record not prepared on time for filing. Petitioners (who do not and did not appear *in forma pauperis*) claim that that tardiness was attributable to the receiver's failure to "make funds available" to pay for that part of the record they wanted filed.

(c) The trial court's failure to grant a continuance of a hearing no one moved to continue. The hearing was to approve a settlement which counsel helped negotiate, to which he never objected, and which he considered to be in his clients' best interest; he did not appear at it because of an injury.

STATEMENT OF THE CASE

In August 1963 Mr. Free, who is one of the respondents in this Court, filed a petition in a Nevada trial court to appoint a receiver for Transcontinental Power Company ("Transcon"), a Nevada corporation in which he owned stock. One of the grounds of the petition was that some directors and officers of Transcon were wasting Transcon's assets. (Peti. pp. 4-5). Those directors and officers, along with Transcon, are the petitioners in this Court.

The Nevada trial court granted Mr. Free's petition and appointed a receiver. That appointment was affirmed by the Nevada Supreme Court three years ago. *Transcon-*

tinental Oil Co. v, Free, 80 Nev. 207, 391 P.2d 317 (1966). No petition for certiorari to this Court to review that affirmance was ever filed, and it is *res judicata.* See Peti., Opinion, App. E, pp. 9, 11-12.*

Before Mr. Free's petition to appoint a receiver was filed, Transcon had become the lessee of a steam lease of lands in the Imperial Valley, California. It had also entered into an agreement with Western Geothermal, Inc. ("Western"), a respondent in this Court, which permitted Western to earn an interest in the lease by drilling wells capable of producing specified geothermal energy.

Western intervened in support of Mr. Free's petition. Transcon counter-claimed against Western, alleging some failures to perform under the Transcon-Western agreement.

Then the receiver was appointed and his appointment affirmed. The receiver, Western and petitioners, all represented by counsel, negotiated a settlement of Western's and Transcon's differences. (Peti., Opinion, App. E, pp. 9-10).

In accordance with Nevada law, the receiver petitioned the Nevada trial court to approve that settlement. (Peti., Opinion, App. E, pp. 13-18) No objection to that petition was ever filed by anyone. The trial court found it to "be for the best interests of the stockholders" of Transcon to make the settlement, which it also found to be "fair and proper . . . so far as . . ." Transcon is concerned. Accordingly, the court approved it. (Peti., App. A,† pp. 1-2)

The settlement provided for Transcon's acceptance of a 20 per cent "carried interest" in the lease of Imperial

---

*The Nevada Supreme Court Opinion to which this petition for certiorari is directed is set forth in Appendix E to the Petition, and is referred to as "Peti., Opinion, App. E, p."

†Appendix A to the Petition sets forth the trial court's decision. The decision also found the Agreement to be fair and proper to the Salton Sea Power Company, a party to it, which is not a petitioner in this Court.

Valley lands in lieu of the 40 per cent "working interest" for which the Transcon-Western agreement had initially provided. The owner of a "working interest" has to put up his share of costs in the venture in which he holds the interest; the owner of a carried interest does not have to put up any money in the venture, and takes no risk.* The need for changing Transcon's interest from working to carried arose from the fact that Transcon simply had no money to put up. (Peti., App. C, p. 5; Opinion, App. E, pp. 9-10)

The settlement also provided that Transcon's counter-claim against Western was to be dismissed, which was done, and that Western was to pay the receiver $50,000, which was also done. (Peti., App. B, p. 3; Opinion, App. E, pp. 10-11)

No objection was made to the settlement until after that $50,000 was received by the receiver and disbursed by him. After that happened, petitioners, now represented by different counsel (Peti. pp. 7-8), appealed to the Nevada Supreme Court from the trial court's order approving the settlement their former counsel had helped negotiate (Peti., Opinion, App. E, p. 9). They also appealed from the order dismissing Transcon's counter-claim. The Nevada Supreme Court affirmed those orders, because it saw "no error" in them. (Peti., Opinion, App. E, p. 18)

A petition for rehearing was denied (Peti., App. G, H), and this Petition followed. The Petition attacks the settlement, but it does not challenge the trial court's finding that the settlement was in the best interest of Transcon's stockholders, and was fair to Transcon itself. It does raise a number of other questions, none of which is present, federal or substantial.

---

*Petitioners' contention (Peti., p. 7) that a 20 per cent carried interest is "only ½ of a 40 per cent working interest" is therefore untrue.

ARGUMENT

A. First Question

The first question (see petitioners' questions 1-3, Peti. pp. 1-2) is whether the Nevada court's decision approving the settlement agreement, which was negotiated among the court appointed receiver, Western, and petitioners, denies any petitioner anything without due process of law.

The answer is plainly no. The court found the agreement to be fair to Transcon and its stockholders, that finding is not attacked, and that is an end to the matter.

But petitioners say that the question is whether a court can constitutionally "remake the contract between the parties." (Peti., p. 2, questions 1 and 2). The petitioners have in mind the common law rule of construction preventing courts from rewriting contracts the meaning of whose terms are disputed, and requiring instead that courts interpret what the disputed terms mean. (See Peti., pp. 15-16)

A court's failure to apply that common law rule is obviously not a federal question. Anyway, that question is not in this case. The Nevada court was not presented with a construction problem. It was presented with the question whether to approve a negotiated settlement agreement, one of whose provisions respected the modification of an agreement.

Petitioners seem to agree to that proposition, and their claim in fact rests on the contention that the Nevada court could not constitutionally "delegate" to a court appointed corporate receiver the power to negotiate a settlement of a claim the corporation had against another. (See Peti., pp. 2-3, question 3).

That contention is frivolous. Receivers of state corporations appointed by state courts with power to compromise corporate claims have been recognized by federal

courts for years. Indeed, under some circumstances comity requires federal courts to permit state court appointed receivers having that power to compromise to act in preference to federal court receivers who, incidentally, enjoy the same power. See *Commonwealth of Pennsylvania v. Williams*, 294 U. S. 176, 182, and note 1 at pp. 182-84 (1935). See also *Harkin v. Brundage*, 276 U. S. 36 (1928); *Superior Oil Corp. v. Matlock*, 47 F.2d 993 (10th Cir. 1931).

Petitioners try to spice up their contention by alleging that the receiver in this case was "appointed on the application of another party to a lawsuit" and settled "the very litigation in which he was appointed." (Peti., pp. 2-3)

Those allegations don't make this into a federal case, and petitioners cite no authority for the proposition that they do. In any event, they are false. The receiver was appointed on "application" of Mr. Free, not Western, in a proceeding arising out of that application and in which Western merely intervened. That proceeding ended three years ago when the Nevada Supreme Court affirmed the appointment. (pp. 3-4, above) The settlement was made with Western, not Mr. Free. The "litigation" which was settled arose out of a separate counter-claim filed by Transcon in the original proceeding; the fact that it arose out of a separate counter-claim instead of a complaint filed in a separate action is hardly of constitutional significance.

B. Second Question

The second question (petitioners' fourth question) is whether a Nevada court appointed corporate receiver constitutionally can make a settlement providing for assignment of an interest in California land, without an ancillary administration in California.

Petitioners say no because (1) "custom and practice provides for ancillary receivership in jurisdictions where the property is located," and (2) "this rule is protected under the United States Constitution." (Peti., p. 18)

As to proposition number one, custom and practice is precisely the reverse. A statutory corporate receiver, like the receiver in this case, is the successor to all his corporation's powers. Therefore his acts, including those respecting property owned by the corporation and located in a foreign state, are customarily accorded the same recognition in that foreign state that the corporation's own acts are. Accordingly, ancillary administrations in the foreign state are unnecessary, and they are not customary. (See 17 FLETCHER, CORPORATIONS, § 8562; *Relfe v. Rundle*, 103 U. S. 222 (1880); *Converse v. Hamilton*, 224 U. S. 243 (1911); *Clark v. Williard*, 292 U. S. 112 (1933); *Nunn v. Feltinton*, 294 F.2d 450 (5th Cir. 1961), *cert. den.*, 369 U.S. 817 (1962) (holding Illinois receiver's Illinois court approved assignment of Texas real estate valid in Texas.)

As to proposition number two, the constitutional rule is precisely the reverse: Full faith and credit requires one state to recognize the title to property in that state of a statutory corporate receiver appointed by a court of the state where the corporation was organized. *Clark v. Williard*, 292 U. S. 112 (1933).

Petitioners' argument appears to be based in part on a misconception of what the Nevada court and its receiver did. (See the reference to *in rem* proceedings at Peti., pp. 18-19) The court merely approved an agreement by which the receiver agreed to transfer an interest in out-of-state property; it did not purport to determine title to that property. Whatever the rule respecting a court's power to determine title may be, it has been settled for over 50 years

that a court may constitutionally *order* a party before it to transfer title to out-of-state property. The party's "obedience is compelled by proceedings in the nature of contempt." *Fall v. Eastin*, 215 U. S. 1, 11 (1909).

Petitioners' argument is also based upon an upside-down version of the full faith and credit clause. That clause requires the courts of one state *to give effect* to the judgments and laws of another state. (See cases cited at Peti., pp. 16-17). It does not require the courts of one state *not* to give effect to another's laws and judgments. See *Nunn v. Feltinton, supra.*

Therefore, even if California were not required to give effect to the Nevada court appointed receiver's court approved assignment, nothing prohibits California from doing so as a matter of comity—which it certainly would.* *Rozan v. Rozan*, 49 C.2d 322, 317 P.2d 1 (1957).

C. Third Question

The third question (petitioners' fifth question, Peti., p. 3) is whether these three "procedural discrepancies" deprived petitioners of anything without due process of law:

(1) *First discrepancy:* The Nevada Supreme Court did not accord the status of appellant to a party not named as appellant in the applicable Notice of Appeal.

---

*Petitioners cite some California cases (Peti., p. 18) for the proposition that according to California law foreign states have no jurisdiction to determine title to, or to permit receivers to alter title to, California property. Those cases involved "chancery receivers," rather than statutory corporate receivers, as to which the rules are entirely different. See cases cited at p. 7, above. Furthermore, California holds that even though a foreign judgment may not determine title to California property, the judgment ought to be followed as a matter of comity to the extent it determines the rights in the property of the parties who were before the foreign court. *Rozan v. Rozan, supra.* The Nevada court's approval of the settlement agreement did not purport to do anything more than that. See pp. 8-9, above.

Only parties named in the "notice of appeal are brought within the appellate court's jurisdiction," *Cook & Sons Equipment, Inc. v. Killen,* 277 F.2d 607, 609 (9th Cir. 1960), and therefore not according an unnamed appellant an appellant's status is perfectly proper. See also Fed. Rules Civ. Pro., Rule 73(b); Peti., App. G, pp. 20-21.*

Moreover, petitioners do not claim that the Court's action in anyway prejudiced them, nor could they. First, because the Court considered the issues anyway (Peti., App. G, p. 20). Second, because counsel who argued the appeal was counsel to all appellants, including the unnamed one (Peti., p. 8), and presumably presented to the Court all points and arguments he considered pertinent to those issues.

(2) *Second discrepancy:* The Nevada Supreme Court refused to file a part of the record not prepared on time for filing.

Petitioners claim that that refusal was wrongful because the reason for their tardiness was the receiver's failure "to make funds available." (Peti., p. 3)

There is no constitutional rule, and petitioners point to none, requiring one party to litigation—a receiver or anyone else—to make funds available to another to process an appeal. Certainly there is no such rule where the party wanting funds does not appear *in forma pauperis;* petitioners did not appear in that form in either Nevada court, and they don't here.

In any case, petitioners don't claim that inclusion of the omitted portion of the record would or might have changed the result, and therefore any error in that regard was harmless.

---

*Appendix G sets forth the Nevada Supreme Court's decision denying petition for rehearing.

(3) *Third discrepancy:* The Nevada trial court failed to continue a hearing no one moved to continue.

Petitioners claim that that failure was wrongful because petitioners' former counsel was hospitalized at the time of the hearing and the Court knew it. (Peti., p. 3)

The hearing was on the petition to approve the settlement which hospitalized counsel had helped negotiate. Counsel had not filed an objection to that petition (and no one else ever did—see pp. 4-5, above). He had in fact become "convinced" that the settlement "was the best possible arrangement." (Peti., App. C, p. 6*)

Therefore counsel was apparently *for* approval of the settlement, not against it.† Petitioners don't claim otherwise. His failure to appear to argue *for* the settlement which petitioners, through new counsel, attack in this Court, was their good fortune, not grounds for complaint.

Moreover, granting continuances is a matter for the trial court's discretion, and failure to grant one does not raise a due process question. *Cf. Glasser v. Wessel,* 152 F.2d 428 (2d Cir. 1945), *cert. den.*, 328 U. S. 839 (1945).

---

*Appendix C sets forth the trial court's ruling denying a motion to vacate judgment.

†Significantly, on February 25, 1965, counsel filed a motion to continue a trial, based on an affidavit dated February 23, 1965. The hearing was set for February 26, but counsel never moved to continue it. See Record on Appeal, Vol. II, p. 384; Peti., App. C, p. 6.

CONCLUSION

Transcon and Western settled their differences over two years ago. The Nevada trial court found that settlement to be fair to Transcon and its shareholders. Petitioners do not claim that it wasn't fair. The questions that they raise are not federal, and they do not concern anyone. The parties have work to do drilling that California land, and they should be permitted to get on with it unhindered by this litigation. The petition should be denied.

Respectfully submitted,

VARGAS, DILLON, BARTLETT & DIXON
JOHN C. BARTLETT
OWEN JAMESON
195 South Sierra Street
Reno, Nevada
By OWEN JAMESON
Attorneys for Respondent and Intervenor, Western Geothermal, Inc.

SUBJECT INDEX

Page

Questions Presented 2

Statement of the Case 3

I.

Respondent's Contention That the Receiver Was Appointed on Free's Petition Fails to Consider Essential Facts 3

II.

Respondent's Contention That Petitioners' Counsel Negotiated the Agreement and Did Not Object to the Petition to Approve the Settlement Ignores the Essential Facts 3

III.

Respondent's Contentions That the Agreement Was for the Best Interest of Transcon, That the Finding to That Effect Is Unchallenged, and That Risk Was Shifted Are Contrary to the Record 5

Argument 7

I.

Neither a State Court nor a Temporary Receiver Appointed by a State Court on the Application of Parties to Litigation Can Constitutionally Remake the Contract Between the Parties to That Litigation and, Prior to a Judgment on the Merits, a Court Cannot Constitutionally Delegate to a Receiver the Authority to Settle the Very Litigation in Which He Was Appointed; These Federal Questions of Substance Should Be Determined by the Supreme Court of the United States 7

II. Page

A Temporary Receiver Appointed in an Action in One State Cannot Convey or Alter Title to Land in Another State Without Ancillary Appointment or Order in the State Where the Land Is Situated and This Important Question Should Be Determined by the United States Supreme Court 10

III.

The Nevada Court Denied Transcontinental Power Company Due Process of Law by Excluding It as an Appellant on the Ground That, Although Named as an Appellant in the Original Notice of Appeal, It Was Omitted From an Amended Notice of Appeal 15

IV.

Refusal to File Part of the Record Was Denial of Due Process of Law 16

V.

Petitioners Were Denied Due Process of Law By the Denial of Opportunity to Be Heard With Effective Aid of Counsel; This Raises a Question Which Should Be Decided by the Supreme Court of the United States 17

Conclusion 19

TABLE OF AUTHORITIES CITED

Cases	Page
Caminetti v. Guarantee Union Life Ins. Co., 22 Cal. 2d 759, 141 P. 2d 423	13
Chung Sing v. Southern Pacific Co., 178 Cal. 261, 172 Pac. 1103	15
Clark v. Williard, 292 U.S. 112, 78 L. Ed. 1160, 54 S. Ct. 615	12, 14
Commonwealth of Pennsylvania v. Williams, 294 U.S. 176	8
Converse v. Hamilton, 224 U.S. 243, 56 L. Ed. 749, 32 S. Ct. 415	11
Green v. Van Buskirk, 5 Wall 307	13
Harkin v. Brundidge, 276 U.S. 36	8
Hervey v. Rhode Isle Loc. Works, 93 U.S. 664	13
Kitchenmaster v. Mutual Auto Ins., 21 N.W. 2d 727	15
Nunn v. Feltinton, 294 F. 2d 450	13
Poggetto v. Bowen, 18 Cal. App. 2d 173, 63 P. 2d 857	15
Relf v. Rundle, 103 U.S. 222, 26 L. Ed. 337	11
Security Trust Co. v. Dodd M. & Co., 173 U.S. 624	14
Superior Oil Corp. v. Matlock, 47 F. 2d 993	8
United States v. Pink, 315 U.S. 203, 86 L. Ed. 796, 62 S. Ct. 552	13
Wolff v. Hubert, 192 N.Y.S. 801	15

Statutes

Code of Civil Procedure, Sec. 568.5 14
Code of Civil Procedure, Sec. 692 14

Textbooks

4A Corpus Juris Secundum, Sec. 593(8), p. 345 16
16 Fletcher, Corporations, Sec. 7666, p. 19 11
17 Fletcher, Corporations, Sec. 8562, p. 871 11

IN THE

Supreme Court of the United States

October Term, 1966

No. 1439

OWEN E. JACKSON, GEORGE DITSON JONES, GEORGE H. HOWELL, JR., WINONA L. JACKSON and TRANSCONTINENTAL OIL CO., INC. of NEVADA, now known as TRANSCONTINENTAL POWER COMPANY, a corporation,

Petitioners and Defendants,

vs.

WESTERN GEOTHERMAL, INC., a corporation,

Respondent and Intervenor,

WILLIAM FREE,

Respondent and Plaintiff,

and

HARRY C. LEVY, as Receiver of Transcontinental Power Company, SALTON SEA POWER COMPANY, and HARRY LEVY, as Receiver of Salton Sea Power Company,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Nevada.

REPLY BRIEF OF PETITIONERS.

(In Reply to Brief of Respondent Western Geothermal, Inc. in Opposition to Petition for Writ of Certiorari).

Petitioners Owen E. Jackson, George Ditson Jones, George H. Howell, Jr., Winona L. Jackson and Transcontinental Oil Co., Inc. of Nevada now known as Transcontinental Power Company, a corporation, referred to herein as Transcon, hereby reply to the brief of respondent Western Geothermal, Inc. in Opposition to Petition for Writ of Certiorari.

Questions Presented.

Respondent (Br. p. 2) misconstrues our questions 1-3 (its Question 1) as involving settlement of a claim against "another", meaning a person not a party to the action. Transcon's "claim" which was settled was against a party on whose petition the receiver was appointed. Thereby, Transcon was deprived of a trial and decision on the merits and the contract was remade. The settlement was effected by assignment of the lease to that party (subject to a carried interest, payment of $50,000.00 and a promise to reassign or pay more) as stated herein in part I of the Argument herein.

Respondent's Question 2 (Petitioners' 4) is broadly stated as "a receiver's" power over extraterritorial real property. If some types of "receivers" can constitutionally have such power, the narrower included question as to the jurisdiction of a temporary receiver to exercise power as herein exercised is an important question.

Respondent says (Br. in Opp. p. 3) Question (3) (c), petitioners' Question 5C, involves the court's failure to continue a hearing not requested to be continued and a hearing on the agreement counsel for Transcon allegedly helped negotiate. The statement of the question presented could be improved by restating it: Were petitioners denied due process of law by the denial of opportunity to be heard and denial of effective aid of counsel?

STATEMENT OF THE CASE.

I.

Respondent's Contention (Br. p. 3) That the Receiver Was Appointed on Free's Petition Fails to Consider Essential Facts.

Respondent sought the appointment of the receiver by its complaint in intervention dated October 1, 1963 and filed October 22, 1963 [Rec. Vol. I, pp. 36-38] and by the affidavit of Chandler Ide, its secretary and vice president (filed on October 8, 1963 as Exhibit A to Free's petition) stating respondent's interest required the appointment of a receiver of Transcon [Rec. Vol. I, pp. 9-12]; the order appointing the receiver recited that it was on respondent Western's complaint in intervention and said affidavit of Chandler Ide as well as Free's petition [Rec. Vol. I, p. 49].

II.

Respondent's Contention (Br. p. 4) That Petitioners' Counsel Negotiated the Agreement and Did Not Object to the Petition to Approve the Settlement Ignores the Essential Facts.

There was no evidence that petitioners' counsel agreed to the settlement as shown by his statement that he would have to give token resistance to the petition to approve or authorize the settlement [Rec. Vol. III, p. 469; Vol. XI, p. 127]. He did not have authority to settle as shown by the fact that petitioners first learned of the settlement in April, 1965 [Aff. of Owen E. Jackson dated 8/24/65, Rec. Vol. III, between pp. 474 and 475].

Regarding failure to object or move for a continuance of the hearing on the petition for authorization,

note that the petition was filed after counsel was hospitalized. On February 10, 1965 the receiver of Transcon and of Salton Sea filed the petition [Rec. Vol. II, p. 353] to which was affixed a proposed settlement agreement and assignment of the lease and in which he requested an order of court for the service of the petition on the parties by mailing the same. It was alleged that the settlement was in the best interest of the two corporations and the proposed agreement and assignment were attached [Rec. Vol. II, pp. 355-373]. No affidavit or other proof of service of the petition was attached to the petition or filed otherwise.

On said February 10, 1965 the court signed and filed the order that notice of "this petition" be served on all parties and that it be served on the defendants "through their attorneys", that objections to the petition be filed no later than ten days after the mailing of said petition to said attorneys "which will be evidenced by affidavits of mailing" [Rec. Vol. II, pp. 374-375]. On February 12, 1965 a notice addressed to the parties and their attorneys was filed but without any affidavit or other evidence of mailing or service [Rec. Vol. II, pp. 376-377]. Although there is evidence that counsel for Transcon knew a petition *would* be filed, there is no evidence by affidavit, testimony, certificate or otherwise of any person to the effect that he personally or otherwise served the petitioners or their attorneys before the hearing, and no evidence that any one had personal knowledge of any service of either the notice of time and place of hearing or the filing of the petition. Counsel's motion for a continuance of the trial and proof of his incapacity was served on February 24th and filed on February 25, 1965 [Rec.

Vol. II, pp. 384-385 and attached pages]. Furthermore, the counterclaims were dismissed *ex parte* [Rec. Vol. III, p. 421].

III.

Respondent's Contentions (Br. pp. 4 and 5) That the Agreement Was for the Best Interest of Transcon, That the Finding to That Effect Is Unchallenged, and That Risk Was Shifted Are Contrary to the Record.

The 1962 agreement between the parties prohibited assignment and contemplated operation by respondent [Rec. Vol. I, pp. 109-111]. After respondent attained, at its expense, capacity to produce 12,500 kw, 40% of the risk would be borne by Transcon. Obviously, the parties believed that on achieving such production financing would be available. That agreement prohibited farmouts and required operation by respondent. The receiver's agreement does not require operation by respondent and provides that upon farmout, respondent retains 80% of the total interest reserved on such farmout. As a practical matter, Western will not operate, will not take the risk, and will not make a substantial investment in the project, it will farmout or assign to others.

Respondent contends (Br. p. 5) that the owner of a working interest "has" to put up his share of the cost in a venture and that Transcon had no money to put up. Petitioners contend that a trial would have resulted in the determination that respondent had not performed its drilling obligations. Respondent represented to the court that drilling had to take place and that the lessor would cause the forfeiture of the lease if drilling did not take place (Pet. for Writ,

pp. 8-9). Yet, paragraphs 4 and 4.3 of the receiver's agreement provided that Western's obligations were conditional upon the lessor's agreeing to such amendments to the lease as it deem necessary [Rec. Vol. II, pp. 358 and 399]. As soon as the receiver made the new contract and assigned the lease to a party litigant, the landlord waived the drilling requirements and no drilling has taken place [Rec. Vol. III, p. 498].

Respondent can now wait and farmout; therefore the respondent is not required to take risk and Transcon is not relieved of any risk; the receiver's agreement reduces Transcon's interest to 50% of what it previously was and eliminates the guarantee of production.

There was no showing that Western had any assets or that its parent company, Natomas Company, would risk its assets on further development. No plan of development was proposed and Western did not demand that Transcon or the receiver of Transcon participate in any development or raise funds therefor. Respondent's position was that Transcon had to be cut down or there would be no more development and the lease would be lost.

The showing of most of these facts in our petition, pages 7-9, does challenge the court's finding that the settlement was in the best interest of Transcon's stockholders.

ARGUMENT.

I.

Neither a State Court nor a Temporary Receiver Appointed by a State Court on the Application of Parties to Litigation Can Constitutionally Remake the Contract Between the Parties to That Litigation and, Prior to a Judgment on the Merits, a Court Cannot Constitutionally Delegate to a Receiver the Authority to Settle the Very Litigation in Which He Was Appointed; These Federal Questions of Substance Should Be Determined by the Supreme Court of the United States.

Respondent attempts (Br. p. 2) to restate petitioners' first three questions presented (Petition, p. 2) and modify them to indicate that the question is, can the receiver negotiate the settlement of a claim asserted against "another", apparently meaning persons other than parties to the lawsuit. Respondent contends (Br. pp. 3 and 7) that the trial court granted Free's petition for a receiver.

The appointment was on respondent Western's petition too as shown herein in part I of the Statement of the Case. The receiver negotiated with a party on whose petition he was appointed.

Respondent again urges that we do not attack the finding of the fairness (Br. p. 6). We do; see part III of the Statement above.

Where the receiver deals with a party other than the party to the litigation, he is of course, not attempting to settle the very litigation in which he was appointed. Our contention is that where there is a dispute over the meaning, performance or breach of a contract or

joint venture agreement, parties to that agreement and litigation cannot procure the appointment of a receiver, and have him change the contract, and thereby deny the parties the right to a trial on the merits of the case. Neither a court nor a receiver *pendente lite* should take one party's property to give relief or rights to other litigants (except as the law provides for performance or damages).

None of the cases cited by respondent indicate that a receiver can be appointed and decide the issues in the very litigation in which he is appointed. As a matter of fact, *Commonwealth of Pennsylvania v. Williams*, 294 U.S. 176, 183 involved a petition filed in the federal district court for the appointment of a receiver and for liquidation of the corporation; the Supreme Court of the United States stated of the procedure in the state of domicile that there was no contention

> ". . . that the procedure thus provided is inadequate, or that it will not be diligently and honestly followed. In such circumstances, the discretion of the District Court invoked by the . . . Commonwealth, should have been exercised to relinquish jurisdiction in favor of the State Court jurisdiction."

That case, *Harkin v. Brundidge*, 276 U.S. 36, and *Superior Oil Corp. v. Matlock*, 47 F. 2d 993 merely hold that of two courts with concurrent jurisdiction, the first to obtain jurisdiction is entitled to retain jurisdiction. It did not involve the issues herein where the question is the nature and extent of jurisdiction

which does not deny due process, not the exercise of concurrent jurisdiction.

Respondent contended it had met its requirement to drill under the 1962 agreement and petitioners contended respondent was in default. This issue should have been tried. Respondent said that drilling must be resumed or the lease would be lost, it thereby procured the receiver's agreement which exonerated respondent's drilling obligations in the 1962 agreement and permitted Western to escape its obligations in the agreement with the receiver unless the lease be amended as respondent deemed necessary; respondent then got the lessor to waive obligations of drilling and production.

If the agreement is a decision, it was premature and is unsupported and unjustified by the record; there should have been a trial on the merits to determine petitioners' contention that Western had not earned its position and petitioners made a substantial investment in operations and remedial work on a non-commercial experimental well.

These wrongs are even more a taking of property without due process of law and are federal questions of substance in view of the incapacity of petitioners' counsel and lack of notice of filing and of time for hearing of the petition for approval of the settlement discussed in part V of this argument below and the facts stated in part II of the Statement of the Case, to which reference is hereby made.

II.

A Temporary Receiver Appointed in an Action in One State Cannot Convey or Alter Title to Land in Another State Without Ancillary Appointment or Order in the State Where the Land Is Situated and This Important Question Should Be Determined by the United States Supreme Court.

Of the question of the Nevada receiver's dealing with the California real property, respondent argues that the statutory corporate receiver succeeds to all powers of the corporation; that ancillary administrations are "unnecessary" and "not customary" (Br. p. 8) and that the California cases cited by petitioners are distinguishable in that the receivers were equity or chancery receivers and not statutory receivers (Br. p. 9). Some types of statutory receivers may have powers that some chancery receivers do not have. The difference between case developed law and statutory law does not affect constitutional jurisdictional matters involved in this case. An analysis of the authorities cited by respondent indicates that what is sometimes referred to therein as a "statutory receiver" is the assignee and successor to the rights of a dissolved corporation. Statutes provide that certain types of corporations, particularly, savings and loan associations, banks, insurance companies and money corporations may be terminated by a state authority; then, of course, the rights of the corporation are succeeded to by someone. He may be named a receiver. Such cases have nothing to do with the situation before this court. That reference is frequently to "statutory" receivers' having more power than equity receivers have requires that the law

be clarified by this Honorable Court's granting a writ herein.

For the alleged rule that ancillary administrations in foreign states are unnecessary and are not customary, respondent cite 17 Fletcher, Corporations, §8562 (p. 871). That section in turn refers to 16 Fletcher, p. 19, §7666, where it is said of a business covering two or more states ". . . it is customary to appoint ancillary receivers in the other jurisdictions".

Respondent also cites *Relf v. Rundle,* 103 U.S. 222, 26 L. Ed. 337. In that case, on his petition in Missouri, Relf was appointed receiver of the Life Association of America, a Missouri corporation. Rundle filed a petition in Louisiana for a receiver to take possession of the assets in Louisiana. In Missouri, the corporation was dissolved, Relf succeeded to its assets, appeared in the Louisiana proceeding, moved its transfer to the federal court, and the federal trial court remanded the cause to the state court. The United States Supreme Court reversed the order of remand stating that the corporation no longer existed and Relf, as "trustee", became its successor. Obviously, after the liquidation of a corporation pursuant to a decree on the merits of the lawsuit, the successor has standing to deal with out of state real property. That case is distinguishable from the case now before the court because: it did not involve a temporary receiver; it did not involve an existing corporation; and it did not involve a settlement by a receiver between the parties to a lawsuit altering their contract and making moot the trial of the action without a trial on the merits.

Converse v. Hamilton, 224 U.S. 243, 56 L. Ed. 749, 32 S. Ct. 415, cited by respondent, reversed a judg-

ment of dismissal after the sustaining of a demurrer to a complaint by a receiver to recover shareholders' double liability. It was held that plaintiff was not an ordinary receiver (p. 257) and that he was an assignee and representative of the creditors (pp. 256, 257) and held their title.

Respondent also cites *Clark v. Williard*, 292 U.S. 112, 78 L. Ed. 1160, 54 S. Ct. 615. While the Supreme Court of the United States reversed the state court, it did not require the state court to recognize the act of the receiver appointed in another state. Although there is uncertainty as to when ancillary receivers are required, *Clark v. Willard* does not indicate that ancillary administrations in the state where property is located are unnecessary; the rule is stated in the decision of the United States Supreme Court on certiorari after decision of the state court following the reversal; that second opinion is reported in 294 U.S. 211, 79 L. Ed. 865, 55 S. Ct. 356. There, the holding of the state court that it could ignore the receiver's acts was affirmed.

The Supreme Court said of its prior decision:

> "we held that under the statutes of Iowa, the liquidator was the successor to the corporation, and not a mere custodian. . . . The question was then an open one whether there was any local policy, expressed in statute or decision, whereby the title of a statutory successor was to be subordinated to later executions at the suit of local creditors" (p. 212).

It also said:

> "Every state has jurisdiction to determine for itself the liability of property within its territorial limits to seizure and sale under a process of its court . . . .
>
> ". . . claimants in Montana might pursue their suits and remedies in derogation of the assignment when the law or policy of the locality ordained that this result should follow" (pp. 213, 214).

Respondent cites *Nunn v. Feltinton*, 294 F. 2d 450. There a bank was dissolved and the receiver was the successor to and only party with standing to deal with its property. That case did not involve the remaking of contracts between the parties.

A successor to the assets of a corporation such as referred to in the foregoing cases is not an officer of the court, does not derive his power from the court and is not acting in aid of the jurisdiction of the court. See *Caminetti v. Guarantee Union Life Ins. Co.*, 22 Cal.2d 759, 763 and 764, 141 P. 2d 423.

As ably pointed out by Justice Stone in his dissent in *United States v. Pink*, 315 U.S. 203, 246, 86 L. Ed. 796, 62 S. Ct. 552, a state may refuse to give full faith and credit to transfers by out of state courts and officers of property in its jurisdiction; he cites the following:

> *Green v. Van Buskirk*, 5 Wall. 307, 311-312;
>
> *Hervey v. Rhode Isle Loc. Works*, 93 U.S. 664;

Security Trust Co. v. Dodd M. & Co.; 173 U.S. 624;

Clark v. Williard, 292 U.S. 112, 122 and 294 U.S. 211.

That the eminent counsel representing respondent cannot find a case holding that courts and receivers *pendente lite* can do the acts herein complained of, and that counsel confuse rules on successors upon dissolution of corporations with the rules on mere temporary receivers (before trial and decision on the merits) demonstrates the need for a clarification of the law on these important jurisdictional federal questions of substance.

California wisely protects property rights by requiring the posting and publishing of notices of sales by receivers (§§568.5 and 692, Calif. Code Civ. Proc.). Nevada law can not alter these rules.

Respondent claims (Br. p. 9) that a court can order parties to transfer out of state property. Such is done only to protect or give effect to a right to the property and then only after a trial and decision on the merits. In this case the receiver was a temporary receiver *pendente lite*, the cause was not decided on the rights of the parties, and Western had no right to the lease. Such transfer to respondent deprived Transcon of its property without due process of law.

The Federal questions of substance argued in this part II were not determined by this Honorable Court prior to the Nevada decision (or at all) and are not decided by the state court in accord with applicable decisions of this Honorable Court.

III.

The Nevada Court Denied Transcontinental Power Company Due Process of Law by Excluding It as an Appellant on the Ground That, Although Named as an Appellant in the Original Notice of Appeal, It Was Omitted From an Amended Notice of Appeal.

Respondent refers to this point as the court's not according the status of an appellant to a party not named as appellant (Resp. Br. in Opp. pp. 9-10). Actually, Transcon was named as an appellant in the Notice of Appeal lodged with the clerk, within the time permitted, the required bond and filing fee were paid to the clerk. The problem arises because counsel filed an amended notice of appeal which omitted the name of Transcon. Can counsel by amendment of a notice of appeal unintentionally and without authority leave out an appellant who is otherwise timely and properly an appellant?

We repeat our argument to the Nevada Supreme Court [Rec. Vol. XII, p. 114]. Where notices of appeal stated that the defendant appealed, it was held that plaintiff had properly taken an appeal in *Wolff v. Hubert,* 192 N.Y.S. 801, and in *Poggetto v. Bowen,* 18 Cal. App. 2d 173, 63 P. 2d 857. A notice incorrectly naming "C.A. Burton" as an appellant was held to constitute an appeal by defendant "Geo. W. Blackburn" in *Chung Sing v. Southern Pacific Co.,* 178 Cal. 261, 172 Pac. 1103. See also *Kitchenmaster v. Mutual Auto Ins.* (Wisc.), 21 N.W. 2d 727.

As said in 4A C.J.S., Appeal and Error, Sec. 593 (8), page 345:

> "Mere clerical errors or surplusage, however, or other defects which do not mislead, will not be fatal, but the notice will be sufficient in this respect if the court, cause and parties are sufficiently stated to give appellee full notice of the cause appealed".

In this case the original Notice of Appeal was served on the parties; the amended notice of appeal was not [Rec. Vol. XII, pp. 7-13, 97 and 117 (Appendix to p. 116); Vol. III, pp. 588-590].

Transcon's assets were held or clouded by the receiver. It had the clearest right of any appellant to have Vol. XI of the record filed late.

IV.

Refusal to File Part of the Record Was Denial of Due Process of Law.

Respondent missed the real question presented in petitioners' brief on this point; as stated in our statement of the facts, the temporary receiver appointed by the court and acting as an arm of the court held the assets of Transcon and deprived Transcon of part of the record on appeal by withholding the funds of Transcon. It was the court's own officer who had the duty to provide the record.

Respondent says (Br. p. 10) that the corporation could have appeared *in forma pauperis*. Respondent cites no rule indicating that a corporation could act *in forma pauperis*. In any event, when individuals came up with money for the remaining part of the record

desired and no one was prejudiced by late receipt of that part of the record, the Nevada Supreme Court should have accepted that part of the record [Rep. Tr. of Dec. 1965 hearing, Vol. XI].

Said Vol. XI would have been helpful as follows:

Notice of default was served by lessor, page 125. The receiver believed that the lease would have been lost if a well were not drilled soon, pages 106-108.

The receiver would have done differently if he had known no well need be drilled; pages 109-110.

Receiver made no demand that Western drill, pages 121-123.

The receiver could not or did not attempt to deal with other persons; It held only Transcon's interest (subject to Western's interest) in the lease.

The attorney for the receiver knew petitioners' attorney had no authority to settle and would object, page 127.

V.

Petitioners Were Denied Due Process of Law by the Denial of Opportunity to Be Heard With Effective Aid of Counsel; This Raises a Question Which Should Be Decided by the Supreme Court of the United States.

Respondent says (Br. p. 11) of petitioners' question 5C [respondent's (3)(c)] that our complaint is that the court failed to grant a continuance for a hearing as to which there was no motion for continuance. It is true that there was evidence that counsel for petitioners did attend some negotiations. It was not a nego-

tiated settlement and it was not agreed to; it was ordered by the court. If petitioners' counsel thought the settlement was the best that could be done, such does not have any bearing on the issues before the court. He didn't have the authority to make the settlement and did not purport to agree to it. Furthermore, his belief that it was the best that could be done arose from the erroneous belief induced by the representations of Western that the lease would be lost if additional wells were not drilled. No drilling has taken place since the receiver's agreement was made and the lease has not been lost. The lessor waived the drilling requirement [Rec. Vol. III, p. 498].

When the foregoing was discovered by petitioners, the receiver had Transcon's assets so that it could not employ counsel and other petitioners could not obtain funds on the strength of its stock then held. Its then counsel was relieved on his motion stating he had not been paid costs.

An owner of property and his successor on liquidation can settle a lawsuit without court approval. However, a temporary receiver, *i.e.*, a *pendente lite* receiver, is in a different position.

The receiver, an arm of the court, knew that the corporate owner would object to the settlement [Rec. Vol. III, p. 469; Vol. XI, p. 127], its attorney was going to talk to his clients [Rec. Vol. XI, p. 127], and was led to expect that the matter would be heard by the court on a petition for approval; the receiver and the court knew of the accident and inability of the attorney to appear even if given notice [Rec. Vol. II, pp. 384 to 385 and Ex. A thereto]; the temporary receiver could have

mailed notice to the parties. Due process required notice of time and place of hearing and an opportunity to be heard. Where a court takes a party's assets *pendente lite,* due process requires it to see that the party has effective aid of Counsel (to the extent such assets may provide) in that action. This question is a federal question of substance, not previously determined by, or has been decided in a way not in accord with applicable decisions of, this Honorable Court.

Conclusion.

Without citing the record, respondent contends that it has work to be done. The record contradicts this contention as stated in part III of the Statement of the Case herein.[1]

We think that each of the jurisdictional questions are federal questions of substance not heretofore determined by this court and are decided in a way not in accord with applicable decisions of this court. The combination of procedural wrongs and jurisdictional questions make the acts herein complained of a flagrant taking of property (contract rights) without due process of law by remaking the contract between the parties and is an unconscionable wrong; if the decision stands, many venturers and partners can be expected to lose part of their interest to the partner who agrees to provide the capital, claims that it is desirable for the safety

[1]If respondent speaks of its present intention and status, which is outside the record, is it fair for us to point out that it has sublet or farmed out to Chloride Products, Inc., which has been recovering minerals for about 18 months and that no other activity is planned? Western's lack of a plan was the source of the differences which lead to the claims of default and forfeiture in 1963.

of their common property that it have a larger share and, even though others have performed their part of the bargain and are not liable in damages or otherwise, obtain part of the other's rights without a trial on the merits of any dispute and without support of any rule of law providing for such realignment of rights.

Respectfully submitted,

ROY B. WOOLSEY and
GILBERT W. BOYNE,
Attorneys for Petitioners.

SUPREME COURT, U. S.

FILED

NOV 2 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967
No. 207

OWEN E. JACKSON, GEORGE DITSON JONES, GEORGE H. HOWELL, JR., WINONA L. JACKSON and TRANSCONTINENTAL OIL CO., INC. of NEVADA, now known as TRANSCONTINENTAL POWER COMPANY, a corporation,

Petitioners and Defendants,

vs.

WESTERN GEOTHERMAL, INC., a corporation,

Respondent and Intervenor,

WILLIAM FREE,

Respondent and Plaintiff,

and

HARRY C. LEVY, as Receiver of Transcontinental Power Company, SALTON SEA POWER COMPANY, and HARRY LEVY, as Receiver of Salton Sea Power Company,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Nevada.

PETITION FOR REHEARING.

ROY B. WOOLSEY, AND
GILBERT W. BOYNE,
1617 Westcliff Drive,
Newport Beach, Calif. 92668,
Attorneys for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Argument for Granting of Petition for Rehearing and for Allowance of Writ of Certiorari	3
Conclusion	10
Appendix. Pertinent California Code Sections and Nevada Revised Statutes	App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
Bradley v. Superior Court, 48 Cal. 2d 509, 310 P. 2d 634	5
Flynn v. United States of America, 348 U.S. 909	3
Morello v. Metzinbaum, 25 Cal. 2d 494, 154 P. 2d 670	5
Ogier v. Pacific Oil & Gas Development Corp., 132 Cal. App. 2d 496, 282 P. 2d 574	5
People v. Sidewell, 27 Cal. 2d 121, 162 P. 2d 913	5
Reynolds v. Adden, 136 U.S. 348, 34 L. Ed. 360, 10 S. Ct. 843	6
Siemon v. Russell, 194 Cal. App. 2d 592, 15 Cal. Rptr. 218	5
Rules	
Rules of the Supreme Court of the United States, Rule 58	2
Statutes	
California Code of Civil Procedure, Sec. 568.5	3, 6
California Code of Civil Procedure, Sec. 692	3
California Code of Civil Procedure, Sec. 692(3)	3
California Corporations Code, Sec. 25008	3
California Corporations Code, Sec. 25100	3
California Corporations Code, Sec. 25100(k)	5
California Corporations Code, Sec. 25500	3
California Corporations Code, Sec. 26100	3, 5
California Corporations Code, Sec. 26104	3, 5

	Page
1 Nevada Revised Statutes, Sec. 78.630	3
1 Nevada Revised Statutes, Sec. 78.635	3
1 Nevada Revised Statutes, Sec. 78.635(2)(a)	4
1 Nevada Revised Statutes, Sec. 78.635(2)(c)	4
1 Nevada Revised Statutes, Sec. 78.640	3, 4
1 Nevada Revised Sattutes, Sec. 78.650	3
United States Code, Title 28, Sec. 1257(2)	2
United States Code, Title 28, Sec. 1257(3)	2
United States Constitution, Sixth Amendment	8
United States Constitution, Fourteenth Amendment	8
United States Constitution, Fourteenth Amendment, Sec. 1	3

IN THE

Supreme Court of the United States

October Term, 1967
No. 207

OWEN E. JACKSON, GEORGE DITSON JONES, GEORGE H. HOWELL, JR., WINONA L. JACKSON and TRANSCONTINENTAL OIL CO., INC. of NEVADA, now known as TRANSCONTINENTAL POWER COMPANY, a corporation,

Petitioners and Defendants,

vs.

WESTERN GEOTHERMAL, INC., a corporation,

Respondent and Intervenor,

WILLIAM FREE,

Respondent and Plaintiff,

and

HARRY C. LEVY, as Receiver of Transcontinental Power Company, SALTON SEA POWER COMPANY, and HARRY LEVY, as Receiver of Salton Sea Power Company,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Nevada.

PETITION FOR REHEARING.

Petitioners Owen E. Jackson, George Ditson Jones, George H. Howell, Jr., Winona L. Jackson and Transcontinental Oil Co., Inc. of Nevada, now named Transcontinental Power Company, a corporation, often referred to as Transcon, pray for rehearing of denial of Writ and pray that a Writ of Certiorari issue to review judgments of the Supreme Court of Nevada in the matter before it entitled Jones vs. Free, its No. 5107 and the district court orders affirmed thereby.

Opinions Below.

The opinion of the Supreme Court of Nevada is reported at 422 P. 2d 551, 83 Nev. ..... and is Appendix E to the Petition for Writ herein.

A prior opinion affirming the appointment of the receiver is reported in 291 P. 2d 317, 80 Nev. 207.

Jurisdiction.

Jurisdiction is invoked under 28 U.S.C. §1257(3). The judgment herein would be reviewable also on an appeal under §1257(2). The timely petition was denied on October 9, 1967 and rehearing is sought pursuant to Rule 58.

Questions Presented.

The substantial grounds of hearing available to petitioners although not previously presented include:

(a) Is the Nevada Statute constitutional?

(b) Is it constitutional for a court appointed temporary receiver from the State of Nevada to commit acts which are proscribed as felonies and commit other violations of California law in his dealings respecting California real property and securities?

Petitioners also contend that because of the intervening circumstances of substantial or controlling effect and the essence of time, this court should grant a hearing as to the conduct and jurisdiction of a receiver to do the things complained of in the Petition for Writ of Certiorari independently of the constitutionality of the statute.

Constitutional Provisions and Statutes Involved.

This case involves §1 of Amendment XIV to the United States Constitution:

> ". . . nor shall any state deprive any person of life, liberty or property without due process of law;"

It involves the following statutes, copies of which are appended hereto: California Code of Civil Procedure:

> §568.5 and paragraph 3 of §692: notice of time and place of receivers sales of real property to be posted on the real property and published in a newspaper.

California Corporations Code:

> §25008: A certificate of interest in mining title and an interest in title or profits are securities; §25100; exempt securities; §25500 and §26100: sales thereof without a permit are void; and §26104: it is a felony to issue a security without a permit or to sell one previously so issued.

Vol. 1 Nevada Revised Statutes:

> §§78.630 and 78.650: empowering the court to appoint a receiver in a summary way on affidavits on application of a 10% shareholder; §78.635 giving the receiver power to settle with any debtor or creditor; and §78.640; giving him title to out of state real estate.

Argument for Granting of Petition for Rehearing and for Allowance of Writ of Certiorari.

As said in *Flynn v. United States of America*, 348 U.S. 909 of rehearings:

> "The right to such a consideration is not to be deemed an empty formality as though such petitions will as a matter of course be denied".

The Nevada statute under which the Nevada receiver acted is unconstitutional and its unconstitutionality is a substantial ground not previously presented. We previously confined our grounds to the unconstitutionality of the acts of the Nevada receiver. Whether or not a state may enact legislation permitting the receiver to do as herein stated is a federal question of substance not heretofore determined by this Honorable Court and the case below sustaining constitutionality of the statute was decided in a way not in accord with applicable decisions.

The Nevada statute purporting to give jurisdiction over out of state real estate (Nev. Rev. Statutes §78.640) to a temporary receiver when the very facts of jurisdiction (10% ownership of stock or debts and ground of appointment) were yet to be tried and to give the temporary receiver the power to compound and settle claims with respect thereto (Nev. Rev. Statutes §78.635 paragraph 2 (a) and (c)) was unconstitutional as applied herein by the receiver's making a conveyance of an interest in California real estate. The act of the receiver was not an adjudication of the controversy between the parties but was the remaking of the deal between them and making a different contract between them. This was not a receiver appointed after judgment to carry out a judgment adjudicating a controversy, but rather was a receiver *pendente lite* who, prior to the trial on the issues as to ownership of stock, insolvency and grounds for the appointment of a receiver, conveyed and assigned an interest in California real estate. Specifically, Nevada statute and Nevada receivers cannot deal with California real estate because so to do assumes extraterritorial effect over real property and does not require compliance with the

law of the state where the land is situated; the record does not show any attempt to follow California law in any of the following respects:

a. The receiver's argument created two certificates of interest in a mining title or lease, to wit: Transcont. was to hold a 20% carried interest while Western Geothermal, Inc. was to have an option to keep the operating interest in the lease or to reconvey in which case it would hold a 20% carried interest [Assignment, paragraphs 3, 4 and 8; Rec. Vol. II, pp. 408 to 409 and 412]. Rights to participate in the proceeds of mining or oil ventures are securities in California as held by *People v. Sidewell,* 27 Cal. 2d 121, 162 P. 2d 913; *Morello v. Metzinbaum,* 25 Cal. 2d 494, 154 P. 2d 670. California securities issued without a permit are void (§26100 Calif. Corp. Code) and parties are entitled to rescission as held in *Ogier v. Pacific Oil & Gas Development Corp.,* 132 Cal. App. 2d 496, 282 P. 2d 574 and the issuance is a felony (§26104 Calif. Corp. Code). Issuance of a security pursuant to judicial order is not exempt unless pursuant to a plan under the Bankruptcy Act (Calif. Corp. Code §25100(k)). Exempt transactions do not authorize issuance or creation of securities.

b. The California constitutional prohibition against the impairment of contracts prohibits even a court from impairing the obligation of contract as held in *Bradley v. Superior Court,* 48 Cal. 2d 509, 310 P. 2d 634.

c. Courts cannot remake contracts to settle disputes as held in *Siemon v. Russell,* 194 Cal. App. 2d 592; 15 Cal. Rptr. 218, S. Ct. hear. den.

d. Receivers can assign or sell an interest in real property only after posting on the real property and publishing in a newspaper a notice of the intended sale as required by §§568.5 and 692 of the California Code of Civil Procedure.

e. Out of state temporary receivers cannot assign California real estate without a California court order. It is clear that no constitutional provision requires California to recognize the assignment. See *Reynolds v. Adden,* 136 U.S. 348, 34 L. Ed. 360, 10 S. Ct. 843.

In each of the foregoing respects the statute was unconstitutionally applied so the order sought to be reviewed violated California law and was void.

By acting contrary to California law affecting California real property, the Nevada court denied full faith and credit to the laws of California.

That any of the foregoing could occur is a good reason for not allowing temporary receivers to assign out of state land without benefit of ancillary court order. The most outrageous violation of the rights of petitioners occurred in the ingenious manner in which the respondents applied the Nevada statute. Because of disputes as to the operation of the lease and *alleged* danger of losing the lease, Western caused a receiver to be appointed, not of the whole leasehold, but only of the interest of Transcon. That receiver was in a position that he could not deal with or save the leasehold except by dealing with the party to the suit who held the other interest in the leasehold. The fair way to salvage a leasehold held by two persons is to have a receiver appointed of the entire interest of the two parties in the leasehold; then, the receiver is in a position to deal with either of those

parties and their successors in interest and persons claiming through them or willing to assist or finance them. Where the interest of one party is held by a receiver, only the other party can deal with the receiver. This is inherently the taking of property without due process of law and was an outrageous violation of the constitutional rights of petitioners. It offers a way for any person to make a deal, get a temporary receiver and then enlarge his position by taking property from the one who suffered the temporary receivership and prevent a trial on the very issues raised by the party who caused the receiver to be appointed.

Where an arm of the court, a receiver, holds the assets of a party, he thereby prevents raising funds for defense of such party's rights and he and the court have a special duty to the corporation subject to the receivership. Arthur Goldberg, United States Ambassador to the United Nations and former Justice of this Honorable Court, recently commented in an address to an annual interfaith convocation marking the opening of the fall term for federal and state courts in New York (quoting from the October 25, 1967 issue of the L.A. Daily Journal):

> "One major reason for riots in our cities, . . . is that the rich and poor are not in actuality equal before the law. The Supreme Court in various rulings on indigents' rights has moved to correct this, but the problem is still 'lively and relevant', especially in the lower courts where 'the poor man first comes fact to face with the law' . . . . 'What we cannot afford is to allow a whole class of people to grow up believing that they are born losers, that the game is stacked against them and there is no use even trying to play,' . . .".

Many recent cases hold that the right to counsel in the Sixth Amendment is protected by the Fourteenth Amendment to the United States Constitution. We say the latter should protect one against a court's using his assets to defeat his rights and against the court's violating the law of the place where his real property is situated.

There is also an intervening circumstance of substantial effect which makes the granting of a writ herein of great importance to the public and the parties. That circumstance is the filing by Transcon of a suit in the United States District Court for the Southern District of California alleging that the Nevada orders are void and beyond the jurisdiction of the court for each of the reasons as to which it is argued that the Nevada statute is unconstitutional. It is significant for two reasons. First, Western will contend that only the receiver can act and therefore there is no remedy for the orders illegally made and made without jurisdiction. Secondly, Transcontinental Power Company cannot develop the lease for the many years that it will take to conclude that action. Those issues could be decided on the granting of this petition herein.

An early disposition is in the public interest so that Transcon can resume generation of electricity. The Air Pollution District of Los Angeles County states that the following contaminants were put in the air in Los Angeles County daily during a period ending in January, 1967: sulphur dioxide, by all sources 630 tons, by electric power plants, 465 tons; all con-

taminants except gasoline vapor and motor vehicles, 2145 tons; power plants, 695 tons. In Southern California, 1320 tons of contaminants are emitted in the air daily in the winter in the generation of electricity. The generation of electricity contributes materially to the smog problem which is jeopardizing the health of persons living in Southern California. It has been estimated that the energy potential of the Imperial Valley steam field is equivalent to the total electricity generated in 1959 from fossil fuels in all Southern California and would last for several decades. Most of the proven wells in the field are west of the Imperial fault and bottom in strata in which the fluid consists of about 30% minerals and there is no known way to generate electricity therefrom. A large portion of the Nelson ranch is on the east side of that fault and wells no. 1 and 3 produce water with less than 3½% minerals from depths of less than 4,000 feet which turn to steam.

Southern California Edison Company, the major producer of electricity from fossil fuels, indicated that it would buy the electricity produced from natural steam in the Salton Sea field.

By condensing steam 1,076,120 gallons of water per well will be recovered. It is in the public interest to settle the important cquestions of law by granting of the petition herein rather than reserving the matters of Nevada jurisdiction for determination by the collateral suit which has been filed.

Conclusion.

While petitioners are confident that the void orders are subject to collateral attack, we forsee costly and lengthy litigation to overcome the procedural problems of establishing capacity of plaintiffs to assert the right to the adjudication because of the existence of the receiver.

We earnestly request this Honorable Court to grant this petition for rehearing and grant the petition for Writ of Certiorari so that the outrageous wrongs may be remedied and persons cannot take from their partners, joint venturers, and members of syndicates by having a receiver appointed of the interest of the other partner or joint venturer only, be in such position that the receiver can deal only with the one who caused his appointment, and then have that receiver sell or assign the interest of the one in receivership in breach and violation of the fiduciary relationship of his former partner or joint venturer to the party who caused the receivership.

Considering that Western will assert that only the Nevada receiver can sue to question his violations of the law and procuring a void order, this court should save the parties years of litigation in the collateral action by granting certiorari and striking down the void order on this direct attack and, if not, it should rule that the writ is denied because a stockholder individually or derivatively may, in a collateral action, attack the void order procured by the receiver in violation of constitutional rights of the corporation.

Respectfully submitted,

ROY B. WOOLSEY, AND
GILBERT W. BOYNE.
Attorneys for Petitioners.

Certificate.

The undersigned certifies that the foregoing petition is presented in good faith and is not for delay and the foregoing petition is restricted to the following grounds, to wit: the intervening circumstances of substantial or controlling effect and to other substantial grounds available to petitioner although not previously presented.

ROY B. WOOLSEY
Attorney for Petitioners.

APPENDIX.

California Code of Civil Procedure.

§568.5

Sales; Authority; Manner; Confirmation; No Redemption.

A receiver may, pursuant to an order of the court, sell real or personal property in his possession as such receiver, upon the notice and in the manner prescribed by law for the sale of such property under execution. The sale shall not be final until confirmed by the court. Sales made pursuant to this section shall not be subject to redemption.

§692.

Sale on Execution or Under Power in Mortgage or Deed of Trust; Notice.

Before the sale of property on execution or under power contained in any mortgage or deed of trust, notice threof must be given as follows:

* * *

3. *Real estate.* In case of real property: by posting a similar notice particularly describing the property at least 20 days before date of sale, in one public place in the city where the property is to be sold if the property is to be sold in a city, or, if not, then in one public place in the judicial district in which the property is to be sold and publishing a copy thereof once a week for the same period, in some newspaper of general circulation published in the city in which the property or some part thereof is situated, if any part thereof is situated in a city, if not, then in some newspaper of general circulation published in the judicial district in which the property or some part thereof is situated, or,

in case no newspaper of general circulation and published in the city or judicial district, as the case may be, in some newspaper of general circulation published in the county in which the property or some part thereof is situated. * * *

California Corporations Code.

§25003.

Company. "Company" Includes All of the Following:

(a) All domestic and foreign private corporations, associations, syndicates, joint stock companies, and partnerships of every kind.

(b) Trustees as defined in Section 25004.

(c) Individuals selling, offering for sale, negotiating for the sale of, or taking subscriptions for, any security of their own issue.

§25008.

Security. "Security" Includes All of the Following:

(a) Any stock, including treasury stock; any certificate of interest or participation; any certificate of interest in a profit-sharing agreement; any certificate of interest in an oil, gas, or mining title or lease; any transferable share, investment contract, or beneficial interest in title to property, profits, or earnings.

(b) Any bond; any debenture; any collateral trust certificate; any note; any evidence of indebtedness, whether interest-bearing or not.

(c) Any guarantee of a security.

(d) Any certificate of deposit for a security.

§25100.

Securities Exempted.

Except as otherwise expressly provided in this division the Corporate Securities Law does not apply to any of the following classes of securities.

(k) Any Security issued under or pursuant to a plan of reorganization which, pursuant to any of the provisions of the Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States" approved June 1, 1898, and acts amendatory thereof and supplementary thereto, has been confirmed by the decree or order of a court of competent Jurisdiction. [3 Corp. Code] 21.

§25500.

Permit for Sale of Securities of Company's Own Issue.

No company shall sell any security of its own issue, except upon a sale for a delinquent assessment against the security made in accordance with the laws of this State, or offer for sale, negotiate for the sale of, or take subscriptions for any such security, until it has first applied for and secured from the commissioner a permit authorizing it to so do.

§26100.

Void Securities; Issuance or Sale Without Permit or in Violation of Permit.

Every security of its own issue sold or issued by any company without a permit of the commissioner then in effect authorizing the issuance or sale of the security is void. Every security of its own issue sold or issued by a company with the authorization of the commissioner but which has been sold or issued in non-

conformity with any provision in the permit authorizing the issuance or sale of the security is void.

§26104.
Public Offenses; Penalty.

Every officer, agent, or employee of any company and every other person, who does any of the following acts is guilty of a public offense punishable by imprisonment in a state prison not exceeding five years or in a county jail not exceeding two years, or by a fine not exceeding five thousand dollars ($5,000), or by both such fine and imprisonment:

(a) *Issuance or sale of security in nonconformity with permit.* Knowingly authorizes, directs, or aids in the issue or sale of, or issues or executes, or sells, or causes or assists in causing to be issued, executed, or sold, any security, in nonconformity with a permit of the commissioner then in effect authorizing such issue, or contrary to the provisions of this division, or of the Constitution of this State.

* * *

(d) *Sale of security issued in violation of law.* With knowledge that any security has been issued or executed in violation of any provision of this division, sells, or offers the security for sale.

* * *

(Note: after incidents material herein, §26104 was amended to make the offense punishable by imprisonment not exceeding ten years)

78.630

Application of Creditors or Stockholders of Insolvent Corporation for Injunction and Appointment of Receiver or Trustee; Hearing.

1. Whenever any corporation shall become insolvent or shall suspend its ordinary business for want of funds to carry on the same, or if its business has been and is being conducted at a great loss and greatly prejudicial to the interest of its creditors or stockholders, any creditors holding 10 percent of the outstanding indebtedness, or stockholders owning 10 percent of the outstanding capital stock entitled to vote, may, by petition or bill of complaint setting forth the facts and circumstances of the case, apply to the district court of the county in which the principal office of the corporation is located for a writ of injunction and the appointment of a receiver or receivers or trustee or trustees.

2. The court, being satisfied by affidavit or otherwise of the sufficiency of the application and of the truth of the allegations contained in the petition or bill, and upon hearing after such notice as the court by order may direct, shall proceed in a summary way to hear the affidavits, proofs and allegations which may be offered in behalf of the parties.

3. If upon such inquiry it shall appear to the court that the corporation has become insolvent and is not about to resume its business in a short time thereafter, or that its business has been and is being conducted at a great loss and greatly prejudicial to the interests of its creditors or stockholders, so that its business cannot be conducted with safety to the public, it may

issue an injunction to restrain the corporation and its officers and agents from exercising any of its privileges or franchises and from collecting or receiving any debts or paying out, selling, assigning or transferring any of its estate, moneys, funds, lands, tenements or effects, except to a receiver appointed by the court, until the court shall otherwise order.

[46:177:1925; NCL § 1645]

78.635.

Appointment of Receiver or Trustee of Insolvent Corporation: Powers.

1. The district court, at the time of ordering the injunction, or at any time afterwards, may appoint a receiver or receivers or a trustee or trustees for the creditors and stockholders of the corporation.

2. The receiver or receivers or trustee or trustees shall have full power and authority:

(a) To demand, sue for, collect, receive and take into his or their possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property, of every description of the corporation; and

(b) To institute suits at law or in equity for the recovery of any estate, property, damages or demands existing in favor of the corporation; and

(c) In his or their discretion to compound and settle with any debtor or creditor of the corporation, or with persons having possession of its property or in any way responsible at law or in equity to the corporation at the time of its insolvency or suspension of business, or afterwards, upon such terms and in such manner as he or they shall deem just and beneficial to the corporation; and

(d) In case of mutual dealings between the corporation and any person to allow just setoffs in favor of such person in all cases in which the same ought to be allowed according to law and equity.

3. A debtor who shall have in good faith paid his debt to the corporation without notice of its insolvency or suspension of business, shall not be liable therefor, and the receiver or receivers or trustees shall have power to sell, convey and assign all the estate, rights and interests, and shall hold and dispose of the proceeds thereof under the directions of the district court.

[Part 47:177:1925; NCL § 1646]

78.640.

Property and Privileges of Insolvent Corporation Vest In Appointed Receiver.

All real and personal property of an insolvent corporation, wheresoever situated, and all its franchises, rights, privileges and effects shall, upon the appointment of a receiver, forthwith vest in him, and the corporation shall be divested of the title thereto.

[48:177:1925; NCL § 647]

* * *

78.650.

Stockholders' Application for Injunction and Appointment of Receiver When Corporation Mismanaged.

1. Any holder or holders of one-tenth of the issued and outstanding capital stock may apply to the district court, held in the district where the corporation has its principal place of business, for an order dissolving the corporation and appointing a receiver to wind up its affairs, and by injunction restrain the corporation from exercising any of its powers or doing business what-

soever, except by and through a receiver appointed by the Court, whenever:

(a) The corporation has willfully violated its charter; or

(b) Its trustees or directors have been guilty of fraud or collusion or gross mismanagement in the conduct or control of its affairs; or

(c) Its trustees or directors have been guilty of misfeasance, malfeasance or nonfeasance; or

(d) The corporation shall be unable to conduct the business or conserve its assets by reason of the act, neglect or refusal to function of any of the directors or trustees; or

(e) The assets of the corporation are in danger of waste, sacrifice or loss through attachment, foreclosure, litigation or otherwise; or

(f) The corporation has abandoned its business; or

(g) The corporation has not proceeded diligently to wind up its affairs, or to distribute its assets in a reasonable time; or

(h) The corporation has become insolvent; or

(i) The corporation, although not insolvent, is for any cause not able to pay its debts or other obligations as they mature; or

(j) The corporation is not about to resume its business with safety to the public.

2. The application may be for the appointment of a receiver, without at the same time applying for the dissolution of the corporation, and notwithstanding the absence, if any there be, of any action or other proceeding in the premises pending in such court.

3. In any such application for a receivership, it shall be sufficient for a temporary appointment if notice of the same be given to the corporation alone, by process as in the case of an application for a temporary restraining order or injunction, and the hearing thereon may be had after 5 days' notice unless the court shall direct a longer or different notice and different parties.

4. The court may, if good cause exists therefor, appoint one or more receivers for such purpose, but in all cases directors or trustees who have been guilty of no negligence nor active breach of duty shall have the right to be preferred in making the appointment, and the court may at any time for sufficient cause make a decree terminating the receivership, or dissolving the corporation and terminating its existence, or both, as may be proper.

5. Receivers so appointed shall have, among the usual powers, all the functions, powers, tenure and duties to be exercised under the direction of the court as are conferred on receivers and as provided in NRS 78.635, 78.640 and 78.645, whether the corporation shall be insolvent or not.

[49a:177:1925; added 1941, 405; 1931 NCL §1648.01]